BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

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In re: :

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NORTHERN MICHIGAN UNIVERSITY, : PSD Appeal No. 08-02

RIPLEY POWER PLANT,   :

                                    :

PSD PERMIT 60-07   :

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                              Washington, D.C.

                    Wednesday, October 22, 2008

          The above-entitled matter came on

for ORAL ARGUMENT at approximately 10:00 a.m.

at the Environmental Protection Agency, 1201

Constitution Avenue, NW, Washington, D.C.

BEFORE:

          ANNA WOLGAST

          EDWARD E. REICH

          CHARLES SHEEHAN

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1   PROCEEDINGS
2   MS. DURR: The Environmental Appeals
3 Board of the United States Environmental
4 Protection Agency is now in session for oral
5 argument in re: Northern Michigan University,
6 Ripley Heating Plant, Permit No. 60-07, PSD
7 Appeal Number 08-02, the Honorable Judges Anna
8 Wolgast, Charles Sheehan, and Ed Reich
9 presiding.
10   Please turn off all cell phones,
11 and please be seated.
12   JUDGE SHEEHAN: Good morning. We are
13 here for argument in the matter of Northern
14 Michigan University, Ripley Heating Plant,
15 pursuant to the Board's order of October 2,
16 2008. The parties are Sierra Club, petitioner,
17 opposing the permit; Michigan Department of
18 Environmental Quality, permit issuer; and NMU,
19 the permitee, defending the permit decision.
20   As our order indicated, the Sierra
21 Club has a total of 40 minutes to present its
22 argument and will proceed first. At the

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1 outset, it will inform us if it wishes to
2 reserve up to 10 minutes of time for
3 rebuttal. MDEQ will go second with 30
4 minutes, 5 of which it may reserve for
5 rebuttal. Finally, NMU will proceed third,
6 and that's 10 minutes, 5 of which it may
7 reserve for rebuttal.
8   As we said in our order, the BACT
9 arguments on greenhouse gases will not be
10 entertained here, and you may assume that the
11 Board is generally familiar with all the
12 briefs.
13   Let's begin by asking counsel to
14 state their names for the record and whom
15 they represent, beginning with the Sierra
16 Club, followed by MDEQ, and then NMU.
17   MR. BENDER: Good morning, Your Honor.
18 David Bender on behalf of the Sierra Club in
19 this case, and with me is Bruce Nilles of the
20 Sierra Club.
21   MR. GORDON: Good morning, Your Honor.
22 Neil Gordon on behalf of the Michigan Department

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1 of Environmental Quality.
2   MR. FINTO: Good morning. Kevin
3 Finto, on behalf of Northern Michigan
4 University. At counsel table with me is
5 Catherine Dehlin, general counsel for the
6 university.
7   JUDGE SHEEHAN: Thank you, Counsel.
8   Mr. Bender, you may proceed and
9 advise us up front of your reserving time for
10 rebuttal or not.
11   MR. BENDER: Thank you. Good morning,
12 Your Honors. Sierra Club would like to reserve
13 10 minutes for rebuttal.
14   Your Honors, there were originally
15 seven issues in the petition in this case.
16 After briefing, Sierra Club withdrew one of
17 the issues and at the Board's order, asked
18 the parties not to address the BACT limits
19 for greenhouse gas emissions. Of the
20 remaining issues, I intend to principally
21 focus on three issues here today: BACT for
22 clean fuels, pre-construction monitoring, and

7

1 Class 1 increment impacts. I'm happy to
2 address any of the questions the Board has on
3 other issues in the petition as well.
4   The issue of clean fuels, there's
5 no dispute that Northern Michigan University
6 intends to build what's termed primarily a
7 wood-fire boiler. The boiler is capable of
8 running some back-up fuels, but the BACT
9 emission limit for principally sulfur dioxide
10 is established based on an assumption that
11 the boiler will burn primarily coal, a
12 dirtier fuel.
13   There are two significant problems
14 with that determination. First, the only
15 justification that Michigan DEQ gave for
16 establishing a BACT limit principally on coal
17 was presence of snowfall, which could make
18 wood deliveries difficult. However, this
19 basis does not justify the BACT limit
20 established. The BACT limit established
21 assumes that the plant would burn 100 percent
22 coal during 22 out of every 30 days.

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1   That's 22 days of every month for
2 snowfall, including 22 days in June, 22 days
3 in July, 22 days in August. A total of 267
4 days a year that the BACT limit assumes coal
5 will be burned. And the only justification
6 for burning any coal is as a backup.
7   JUDGE SHEEHAN: Would you have any
8 problem with a permit that bifurcated the year
9 in some respect? So maybe that coal-burning
10 during the winter months when snow makes
11 delivery difficult, according to the state, and
12 wood in the summer, so it wasn't a year-round 22
13 days per month coal limit, but something broken
14 up, depending on weather conditions.
15   MR. BENDER: I think if there was a
16 top-down analysis to determine -- and there was
17 evidence in the record that snowfall really was
18 too deep for a clean fuel delivery, then that
19 would be a possibility.
20   I also note that in the
21 response -- in Sierra Club's comments, Sierra
22 Club raised the issue of considering natural

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1 gas as a backup emergency fuel as well. In
2 response, Michigan DEQ said that the boiler
3 would be a solid fuel boiler and would burn
4 coal or wood.
5   JUDGE WOLGAST: If the permit had been
6 submitted as coal only and had never mentioned
7 wood, would that have been deficient from a PSD
8 and BACT standpoint --
9   MR. BENDER: It would because we know
10 they can burn wood fuel, Your Honor. It'd be a
11 different question if it was incapable of
12 burning wood fuel.
13   JUDGE SHEEHAN: But it can only burn,
14 what percent can only burn wood -- excuse me,
15 only burn coal?
16   MR. BENDER: If it was set up to only
17 burn coal, then I think it would depend on an
18 analysis similar to what the 7th Circuit
19 discussed in its review of the Board's Prairie
20 State decision, which is, is the plant
21 physically incapable of burning clean fuel, or
22 is it merely a preference by the applicant to

3 (Pages 6 to 9)

1 burn coal? What the 7th Circuit specifically
2 said was it made a distinction between a plant,
3 like Prairie State, that was set up only to burn
4 one fuel stream and could not receive any other
5 fuel stream, with a plant that was intended to
6 burn, by contract -- I think the 7th Circuit
7 discussed by contract one fuel stream. The
8 dirty versus clean discussion that the 7th
9 Circuit had was on coal.
10   JUDGE SHEEHAN: What about the fact
11 that the original permit application had
12 3.5 percent sulfur coal, and then the final
13 permit after the addendum went down to
14 1.5 percent sulfur coal? That seems like it's
15 going in the direction for which you're arguing.
16   How do you respond to that?
17   MR. BENDER: Well, I agree that it's
18 going in the direction of cleaner fuel, and I
19 think it indicates that DEQ agrees that there is
20 some ability to consider clean fuels other than
21 the fuel proposed by the applicant. At least
22 early in the process that's what DEQ's position

1 was. I think it's that DEQ's position now
2 before the Board, and especially Northern
3 Michigan University's position concerning in
4 that it says that anything other than the
5 applicant's business decision -- or I think
6 Northern Michigan University uses the term
7 "business plan," and says anything that would
8 change the business plan is off limit for best
9 available control technology and now it's --
10   JUDGE SHEEHAN: Well, the university
11 argues that they are employing a so-called
12 just-in-time system whereby apparently you've
13 just got to race the coal in there, I guess to
14 beat the snows, don't store it for long, it goes
15 right into the boiler and is almost immediately
16 consumed. So a series of quick-hit deliveries.
17 That's the design they say they had used here.
18 What's the problem, if any, with that in your
19 view?
20   MR. BENDER: I think that's the design
21 for all fuels. I think that there's three days
22 of fuel storage for wood or biomass. I think

1 that the fact -- there's no discussion in the
2 record on whether or not there's space available
3 elsewhere on the campus for storage of clean
4 fuel, biomass fuel.
5   JUDGE SHEEHAN: Do you regard that
6 design as a fundamental or inherent aspect of
7 the project?
8   MR. BENDER: I don't believe that it's
9 fundamental to the design in the same way that
10 Prairie State was, because any fuel, any solid
11 fuel that's delivered to the plant gets
12 delivered by truck. Coal is delivered by truck
13 and wood is delivered by truck, and nothing
14 would change in that delivery system, depending
15 on if they pull it right out of the forest and
16 into the plant from a local wood processor or a
17 local storage facility and bring it into the
18 plant. Nothing changes in the design of the
19 fuel handling, which was the issue in Prairie
20 State.
21   Again, Northern Michigan University
22 and DEQ cite the Board's Prairie State

1 decision for a theory in this case that any
2 change other than what the applicant itself
3 designates as its preferred plan is immune
4 from review in a top-down BACT analysis. And
5 this is important because it's something that
6 we're seeing in other states where applicants
7 are coming in in recent years and several
8 very recently, using the term "fuel
9 flexibility," and saying that fuel
10 flexibility is inherent to their plant.
11   And by fuel flexibility they mean
12 they want the ability to be able to burn any
13 kind of fuel, from very clean to very dirty,
14 and telling state permitting agencies that
15 they have to because their permitting agency
16 has to grant BACT limits based on the
17 dirtiest possible fuel because of the
18 flexibility -- the desire to be able to burn
19 a range of fuels is inherent to the design of
20 the plant.
21   JUDGE SHEEHAN: But what's wrong with
22 flexibility if conditions make flexibility

1 necessary? No system, presumably, is perfect,
2 and there must be some flexibility allowed to
3 deal with the realities of daily life.
4   MR. BENDER: And I think that there's
5 flexibility in, for example, how permit limits
6 are established for having some headroom above a
7 permit limit to allow the natural fluctuations
8 in fuel quality. I think it's different to say
9 that the plant wants to burn -- or had the
10 flexibility to burn anything from wood to
11 petroleum coke.
12   JUDGE SHEEHAN: What authority would
13 you offer as far as your flexibility theory?
14   MR. BENDER: I think the 7th Circuit's
15 decision in Prairie State -- I think the 7th
16 Circuit was clear in making a distinction,
17 again, between the physical incapability at
18 Prairie State that was inherent to the design
19 and the applicant's desire or contract to burn
20 different fuels.
21   In fact, the Court said in the
22 Prairie State decision -- the 7th Circuit

1 Act requires an applicant to obtain
2 monitoring data representative of what
3 ambient air quality is in the area that'll be
4 affected by the new facility. It's
5 essentially a look before you leap provision.
6 We want some idea of what the air quality is
7 in the area before significant capital
8 investments, before new sources are
9 permitted.
10   JUDGE SHEEHAN: But what about the NSR
11 manual's allowance of exemptions from perhaps
12 the strict requirement that you cite to use
13 existing ambient data that might not be as
14 source-specific as the regs might be saying?
15   MR. BENDER: The Clean Air Act appears
16 to be specific in that the data should be from
17 the area that will be affected by the source.
18 The New Source Review Manual does say "in
19 certain situations," and it puts boundaries
20 around the situations where up data from other
21 monitors can be used.
22   JUDGE SHEEHAN: So what's wrong with

1 said that a BACT determination has to provide
2 for or take into account cleaner -- the
3 ability to burn cleaner fuels even when
4 there'd be some change to the applicant's
5 plans, or even the applicant's plant design,
6 as long as that change was no more than would
7 be necessary whenever a plant switches from a
8 dirtier fuel to a clean fuel.
9   In this case, we're far removed
10 from a Prairie State situation. There's no
11 question that the plant can burn a clean
12 fuel. In fact, it's designed to burn
13 primarily a wood fuel. It's just that the
14 BACT limit was established and switched it
15 around from having coal as a backup to
16 presuming coal is burned 73 percent of the
17 time, 22 out of every 30 days. That's not
18 consistent with any reasonable interpretation
19 of BACT, that we preserve the clean fuels
20 analysis.
21   Brings us to the second issue,
22 pre-construction monitoring. The Clean Air

1 what the state did here for representative data,
2 they claim anyhow, that might not have been
3 right out the gate of the facility, but still in
4 the nearby area?
5   MR. BENDER: Two things, Your Honor.
6 There's no evidence and no analysis that the
7 data that DEQ used is in fact representative, so
8 you don't know what the air quality is in
9 Marquette, Michigan. DEQ used data from
10 existing monitors located in Escanaba, Michigan,
11 82 kilometers away; Two Rivers, Wisconsin, 255
12 kilometers away; Green Bay, Wisconsin, 227
13 kilometers away; and Milwaukee, Wisconsin, 387
14 kilometers away. That's approximately the
15 distance from here to New York. It'd be like
16 using a monitor outside New York to try to
17 assess what air quality is in Washington.
18   JUDGE SHEEHAN: Well, Escanaba, I'm
19 looking at their background concentration
20 offering that they mentioned in their brief.
21 Sixty-five kilometers out, that doesn't seem
22 like it's the distance from here to New York.

5 (Pages 14 to 17)

1 That's for SO2.
2 MR. BENDER: That's for Escanaba, but
3 some of the other pollutants are, like I said,
4 Milwaukee is 387 kilometers away. The --
5 JUDGE SHEEHAN: What principle would
6 you give us for deciding where that line is?
7 MR. BENDER: One principle and the one
8 that's referenced in the New Source Review
9 Manual is the PSD monitoring guideline, where
10 EPA -- and that's what's referenced, '87
11 guidelines. EPA sets some categories of
12 different types of locations and what EPA
13 considered to be representative data. For a
14 facility located in flat terrain, there's no
15 unusual atmospheric conditions. Where there's
16 multiple sources, the representative data has to
17 be from a monitor that's located no less than 10
18 kilometers from the source, or at a location
19 that's within 1 kilometer of maximum
20 concentrations.
21 That's the test that's most
22 favorable to DEQ. And again, the monitors

1 here, even the closest monitor that you
2 referenced is 82 kilometers away.
3 JUDGE SHEEHAN: What about the
4 document, the Appendix C to the permit
5 application showing a 5 kilometer radius area
6 out from the facility? What relevance or weight
7 does that have?
8 MR. BENDER: If I understand the
9 document you're referencing, it's a document
10 that shows the Cartesian modeling grid.
11 JUDGE SHEEHAN: Right.
12 MR. BENDER: And so the facility and
13 MDEQ modeled the impact from the plant and
14 determined the maximum impacts from this boiler
15 would be within that 5 kilometer radius. And so
16 under the PSD monitoring guideline, the two
17 options -- again, assuming that this was a flat
18 terrain area with no atmospheric conditions, the
19 furthest out that the monitor could be was 10
20 kilometers.
21 I note that Marquette, Michigan is
22 on Lake Superior, which is on a water body

1 which the PSD monitoring guidelines suggest
2 the distances to a representative model are
3 even less than 10 kilometers. But giving DEQ
4 and NMU the benefit of the doubt that it's 10
5 kilometers, all the monitors are again well
6 outside that 10 kilometer radius.
7 JUDGE SHEEHAN: But is it the area of
8 maximum impact that's the threshold here? Five
9 kilometers may be maximum, but that doesn't mean
10 that anything outside of 5 kilometers isn't
11 still measurable and represents the ambient
12 representative air quality data necessary.
13 MR. BENDER: Under the PSD guidelines,
14 it's an either/or. And it's actually three,
15 three options. Ten kilometers within
16 1 kilometer of the source's maximum impact, or
17 within 1 kilometer of the source, plus other
18 contributing sources in the area's maximum
19 impact. And we don't have that point. We have
20 the point of maximum impact in this plant, and
21 that's within 5 kilometers.
22 It's likely that the maximum

1 combined impact area is in that range as
2 well. And so again, that's the first option
3 under that section of the PSD monitoring
4 guidelines is the most beneficial for NMU,
5 NDEQ, and again, we're five times that
6 distance at the closest monitor.
7 JUDGE SHEEHAN: Can we turn to your
8 BACT 2.5 argument?
9 MR. BENDER: Yes.
10 JUDGE SHEEHAN: Let me begin with a
11 question, if I may. The Seitz surrogate policy,
12 PM 10 from PM 2.5, has been in existence since
13 1997, was re-affirmed by rule in 2005. Your
14 argument seems to be that the May rule-making
15 this year that grandfathered in the policy,
16 because that rule-making wasn't effective until
17 July of this year and the permit issues occurred
18 here before July, because the rule wasn't
19 effective until July, the surrogate policy
20 somehow doesn't exist until the rule -- this
21 rule says it does, even though it's been vitally
22 used as far as we can tell for the last 11

6 (Pages 18 to 21)

1 years.
2 MR. BENDER: Your Honor, our position
3 is that the rule does not apply. There's no
4 legislative rulemaking that allows the surrogate
5 policy to be used because the plant comes before
6 the effective date. Instead, to the extent that
7 the surrogate policy would apply, it has to rely
8 on the two guidance memos and the weight of that
9 authority and the -- how convincing that
10 argument is made --
11 JUDGE SHEEHAN: So if the May
12 rulemaking didn't exist at all, it never
13 occurred, would your view be that the surrogate
14 policy existed or did not exist?
15 MR. BENDER: Sierra Club's position
16 would be that the memo certainly existed and a
17 surrogate policy existed, it'd be our position
18 that that policy is unlawful as applied to BACT
19 determinations. And the memos provide as their
20 basis difficulties -- technical difficulties in
21 modeling and monitoring primarily. And --
22 JUDGE SHEEHAN: That doesn't seem to

1 me what you argued in your brief. You seem to
2 say in your brief that because the effective
3 date of the rule is July, and the rule requires
4 the use of a surrogate policy until that point,
5 that the surrogate policy wasn't even applicable
6 until July.
7 MR. BENDER: I'm sorry if that's what
8 we conveyed. And the guidance memos clearly
9 existed to the extent that that constitutes --
10 JUDGE WOLGAST: You're not saying that
11 this permit is not within the timing ambit of
12 the surrogate policy memo and the Seitz memo.
13 You're just arguing that the underlying
14 principle of conflating PM 10 and the 2.5 is
15 unlawful. Is that correct?
16 MR. BENDER: Right. I think that's
17 correct, and let me try to clarify.
18 We are saying that the permit here
19 does not fall within the May 16, 2008
20 regulation. So we're looking only at the
21 guidance memo. And if the guidance memos are
22 lawful and if they are justified using a PM

1 2.5, PM 10 equivalent, then we'd have to rely
2 on those memos.
3 Then we also said that those memos
4 are no longer convincing maybe, because what
5 they relied on as the basis, the policy, it's
6 the actual basis for using that surrogacy
7 approach no longer exists in May of 2008,
8 when this permit was --
9 JUDGE REICH: If we were to conclude
10 that this surrogacy was appropriate, have you in
11 this proceeding or below challenged the PM 10
12 BACT analysis in and of itself, or have you
13 accepted that to the extent that there was an
14 analysis relative to PM 10, that that was an
15 acceptable BACT analysis for PM 10 -- there
16 should have been one for 2.5?
17 MR. BENDER: We have not challenged
18 the PM top-down BACT analysis. We think that
19 they're not equivalent. And actually in
20 Northern Michigan University's brief I think is
21 one of the best examples of why they shouldn't
22 be treated as equivalents here.

1 JUDGE SHEEHAN: If the only issue
2 before us was whether the PM 10 BACT analysis
3 was acceptably done, you would not challenge
4 that the PM 10 analysis was acceptably done,
5 only its use as a surrogate for 2.5.
6 MR. BENDER: Sierra Club does not
7 challenge in this case the PM 10 top-down BACT
8 analysis for PM 10. But again, the Northern
9 Michigan University's brief identifies the test
10 method which Northern Michigan University thinks
11 that the permit requires. And again, we say it,
12 albeit if it's not clear, that this is the case.
13 But if it is that the test method is that NSPS
14 test method, a filterable only particulate test
15 method, it highlights why PM 10 BACT limit in
16 this case is not representative of PM 2.5 BACT.
17 Because PM 2.5 is a majority of -- PM 2.5 from
18 production sources is condensable fraction. And
19 so the BACT limit, the PM 10 BACT limit, would
20 limit a fraction, 20 percent, a little bit more
21 than 20 percent of the total PM 2.5. Because PM
22 2.5 is -- consists mostly of a condensable

1 fraction.
2   JUDGE SHEEHAN: If there are no
3 further questions on that issue, can we turn to
4 your increment argument, increment consumption?
5 I'll begin with Question E.
6   The scheme set out you've certainly
7 reflected in the NSR Manual is that
8 increments are set after a baseline is set.
9 And the baseline, 775, is nailed down. And
10 then emissions after that consume increment
11 or if emissions come offline after that time,
12 the increment pot can grow.
13   Page 10 of the manual, C-10 of the
14 manual, says that emission increases that
15 consume increment are those occurring after
16 the baseline is set, not before. Your
17 argument seems to be that you measure the
18 actual emissions after the baseline, and then
19 all of the emissions pre-baseline and
20 post-baseline consume increment. Thus, you
21 come up with a figure around 16,000 tons of
22 increment consumed by the WEPCO-PIPP plant.

1 Can you explain your theory of how the
2 increment principle works in the PSD world?
3   MR. BENDER: Yes, Your Honor. The Act
4 and the PSD rule distinguish between the major
5 source baseline data and the minor source
6 baseline data, and between the major sources and
7 minor sources. And it says, the plain language
8 is that the actual emissions as defined by the
9 cross-references -- the regulatory
10 definition -- from a major source constructed
11 after the baseline data consumes increment. And
12 that the only two possible definitions of actual
13 emissions are the 24-month annual average or the
14 potential to emit.
15   And what we're saying in this case
16 is DEQ did not do that. And what they claim
17 to have done is say I've taken the difference
18 between a single year, 1973, and another
19 single year, 2006, taken the difference and
20 determined that to be the amount of emissions
21 from the -- entities' Preque Isle plant that
22 consumes increment. And that's not the

1 definition of -- that doesn't fall within any
2 of those definitions of actual emissions.
3 And it doesn't fall within the research
4 review manual's discussion either.
5   JUDGE SHEEHAN: That's not
6 quite -- we'll get to that. That's not quite
7 what I was asking.
8   Say, for example, you had a
9 facility in 1970, say, and maybe 7 units of
10 pollution, and the baseline was set in 1975.
11 Sometime after that, there was a modification
12 and another three -- additional three units
13 of pollution were emitted. Would your
14 argument be that the increment consumption at
15 that point -- post-1975 -- was 3 units or 10,
16 pulling in the original 7 as well?
17   MR. BENDER: It would be the 24 months
18 before the relevant data. And I think the
19 relevant data is why that baseline is
20 established. So --
21   JUDGE SHEEHAN: So would the
22 modification increment consumption include

1 emissions that were set, that were included in
2 the original baseline, or not?
3   MR. BENDER: Maybe I'm not
4 understanding, I'm sorry. The original
5 baseline, are you referring to it as the '73
6 emissions or the '75 emissions?
7   JUDGE SHEEHAN: The seven units of
8 pollution that were included in the original
9 baseline. Would those seven units be included
10 in the increment calculation post-baseline? Or
11 would it just be the additional three that
12 increase after the seven, after the baseline is
13 set?
14   MR. BENDER: It would be all.
15   JUDGE SHEEHAN: All 10?
16   MR. BENDER: All 10.
17   JUDGE SHEEHAN: Then what happens to
18 the -- you're double counting? Because the
19 seven went into the original baseline, so you
20 counted them then and now you count them as
21 increment-consuming as well, so they're counted
22 twice?

1   MR. BENDER: Well, the regulation says
2 that they're not in the baseline, so they'd be
3 increment -- those emissions from -- and the way
4 the regulation reads is the actual emissions
5 from the source. And it's not the modification.
6 The regulations says the actual emissions from
7 the source are outside the baseline in consumed
8 increments. So they wouldn't be -- I think to
9 answer your question, they wouldn't be in the
10 baseline and increment consuming. They just
11 wouldn't be in the baseline.
12   JUDGE SHEEHAN: My question was that
13 they were in the baseline. They were alive and
14 well. They were out there at the time the
15 baseline was calculated. So it seems natural
16 that they would be having been included in the
17 baseline. What would the baseline encompass if
18 not actual emissions as of that point, as of
19 1975?
20   MR. BENDER: And the way Congress
21 defined it is it's a concept that is -- whatever
22 the -- it should be the air quality in the area

1 or the modeling representative of the air
2 quality in the area, but then there's provisions
3 or provisos to that. And some things are
4 subtracted from the baseline if certain events
5 occur. And one of those events is construction,
6 which is then defined to include a modification.
7 So a source that is -- a major source that is
8 constructed or modified after '75 is, by that
9 definition, not within the baseline
10 concentration.
11   JUDGE SHEEHAN: But if there
12 was -- yes, go ahead.
13   JUDGE WOLGAST: Are you saying then
14 that you would recalculate the baseline at that
15 point as well as the increment? When you have a
16 modification post-establishment of the baseline,
17 are you saying you'd recalculate the baseline?
18   MR. BENDER: Conceptually, that's what
19 happens. But I would note that when the
20 modeling is done for the PSD permitting, the
21 modeling is just of the increment and it's
22 compared to whatever the increment is. And so

1 there's a list of sources that are
2 increment-consuming. Their emissions are
3 modeled, and then that total from the
4 increment-consuming source list is then compared
5 to the increment. I'm not aware that the actual
6 baseline concentration is a number that's
7 calculated. It's a calculation of
8 increment-consuming sources compared to the
9 increment. So if a source is modified
10 after -- a major source is modified, major
11 modification, it qualifies as construction.
12   JUDGE WOLGAST: But one thing I'm
13 having trouble with is at the point that they
14 establish the baseline, then an increment is
15 calculated based on then-available new potential
16 emissions that is the delta between the baseline
17 and then the max itself to ensure that the area
18 stays in attainment. The increment then -- I'm
19 just -- I'm having a lot of trouble with the
20 fact that when you pull any new facility or any
21 new modification that then gets sort of taken
22 out of the pre-baseline and then moved over to

1 the other side of the ledger, in my mind,
2 increment would not have been calculated the way
3 it was, if in fact all of those emissions now
4 are moving from one side of the ledger to the
5 other side of the ledger.
6   MR. BENDER: I think -- to answer your
7 question, the increment is established in the
8 regulations. For example, a 24-hour SO2 is 5
9 microns per cubic liter. When a permit
10 application comes in, the permit applicant
11 identifies what's called map sources. All
12 sources will be modeled for map compliance.
13   It also identifies PSD
14 increment-consuming sources. And those PSD
15 increment-consuming sources are then used to
16 run a separate and additional modeling
17 result. And that modeling result is compared
18 to the increment, the 5 microns. And so what
19 you're doing is you're just making your PSD
20 increment-consuming sources list more
21 inclusive by including those sources that
22 major modifications -- major modified sources

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1 that were modified after the baseline date.

2   That source would be included in

3 that modeling runs of the PSD sources. Then

4 that result is compared to the increment

5 threshold, so it'd be the 5 microns, for

6 example, in the class 1 monitor.

7   JUDGE REICH: I go back one step. I

8 understand, I think, the significance of whether

9 something was in or not in based on -- but how

10 is the baseline calculation used? What is the

11 significance of the number you would generate by

12 generating a baseline calculation?

13   MR. BENDER: I see my time is up, Your

14 Honor. I think that answer in the way that I

15 understand it is these permit applications and

16 analysis are wrong is that the baseline does not

17 figure. The application doesn't identify what

18 the baseline was.

19   It only identifies what the

20 increment consumption is and then compares

21 that to the --

22   JUDGE REICH: So you're saying whether

1 this was still included or backed out of the

2 baseline wouldn't have any real significance?

3 The only real significance is whether it's

4 counted towards the increment.

5   MR. BENDER: Right. The significance

6 of it is whether or not it counts towards which

7 sources -- consumed increment are included in

8 that --

9   JUDGE REICH: Right. But it's a focus

10 on consuming increment, not being or not being

11 part of the baseline.

12   MR. BENDER: Right. I don't think

13 identifying what that baseline was as a number

14 in 1975 or today is critical or -- I don't even

15 know that it's looked at. Instead, what it's

16 focused on the amount of increment and how much

17 will exist. Thank you.

18   JUDGE SHEEHAN: I think I'd like to

19 hold you up for a few more minutes if I could, a

20 few more areas yet to go through. Modeling?

21 You seem to be arguing that the -- to take an

22 example, PM and SO2, that the average periods

1 used for the permit limits, permit limits, to

2 align with the NAAQS and increment standard

3 limits in average periods, that the PM and SOX

4 average periods in the permit were generally

5 longer, more hours than the very short NAAQS

6 increment standard time periods.

7   The response to comments by NMU is

8 certainly not very detailed. But in their

9 brief, they make the argument that they did

10 do the calculation that you asked for after

11 all and it came up with 87 pounds per hour.

12 And that reflects short-term emission limits.

13 What's wrong with that?

14   MR. BENDER: The 87 pounds per hour is

15 not an hourly limit and it's not a maximum

16 theoretical emission. Instead, it's taking the

17 24 -- my understanding it's taken a 24-hour

18 limit or the 24-hour emissions, assuming the.2

19 pounds per million BTU SO2 limit, for example,

20 and dividing it by 24. So it assumes that the

21 24-hour limit is actually a 1-hour limit,

22 enforceable on a 1-hour period, but it's not.

1 You know, within that 24-hour period, the source

2 could still comply with the 24-hour average and

3 have double the hour emission rates as long as

4 it made up for that during the 24-hour period by

5 reducing operations or burning of cleaner fuel,

6 such as wood. There's no protection in the

7 limits of a certain average because the limits

8 aren't enforceable that short-term --

9   JUDGE SHEEHAN: So what they claim is

10 a 1-hour limit, you're saying is in reality a

11 24-hour limit?

12   MR. BENDER: That's correct. When you

13 look at the permit, Your Honor, there's for PM

14 -- or SO2, for example, there's a 30-day and a

15 24-hour limit. There's no hour limit, there's

16 no 3-hour limit, which is different from what

17 many permitting sources or permitting agencies

18 do. And I think we included one example as an

19 exhibit where the agency will set limits -- a

20 30-day limit, an annual limit maybe, 24-hour

21 limit, and a 3-hour limit -- and it will model

22 each of those for the relevant mass and

10 (Pages 34 to 37)

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1   increment. And that's consistent with the NSR
2   Manual that says model with the maximum, either
3   the maximum physical capacity or the enforceable
4   limit, when there is an enforceable limit that
5   corresponds to the average in the period.
6   JUDGE SHEEHAN: Thank you. Lastly,
7   turning to the Class 1 increment issue.
8   MR. BENDER: Yes.
9   JUDGE SHEEHAN: The NSR Manual sets
10 out a 1-microgram limit as far as a trigger for
11 the Class 1 analysis goes. You seem to think
12 that's -- I guess you argue in your brief it's
13 unlawful. Is there any limit existing in your
14 mind that's so low that no analysis needs to be
15 done, or any distance so great from the source
16 to the area of impact, the Class 1 impact area,
17 that would not require the Class 1 analysis to
18 be done?
19   MR. BENDER: I think the act prohibits
20 any contribution to a violation. So I think
21 under the act, that's the only option.
22   If your question is whether

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1   actively speaking, is there anything that's
2   de minimis, that there's such a low
3   concentration, I think if there is, it's much
4   lower than what was actually modeled for this
5   plant. This plant model had a 0.42 microns
6   per cubic meter for 24-hour SO2. That's over
7   8 percent of the relevant increment. When
8   the EPA has proposed in the past to do
9   significant impact levels by rule, it has
10 used a metric of 4 percent of the relevant
11 increments. So based on that standard, which
12 I think is still too high, even based on that
13 metric, this is still double that.
14   JUDGE SHEEHAN: So it's less than half
15 of what the NSR Manual sets out, but it's still
16 in your mind unacceptable?
17   MR. BENDER: That's right, Your Honor.
18 The NSR Manual, and I note that it's included in
19 a footnote in the NSR Manual, but the NSR Manual
20 is 24-hour 1-micron standard. It's 20 percent
21 of the entire increment for all
22 increment-consuming sources in an area where

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1   there are numerous power plants. And there's
2   two power plants of numerous units at each in
3   Marquette, Michigan. There are mining
4   operations there. There's this boiler and there
5   are power plants in Northern Wisconsin as well.
6   I mean, when you include all of those, all of
7   those increment-consuming sources, it's
8   certainly foreseeable.
9   JUDGE SHEEHAN: What about the
10 practical reality here that the state did
11 contact the federal land managers at Seney and
12 Isle Royale, both of whom said we don't have a
13 problem.
14   MR. BENDER: I think that was the for
15 the AQRV analysis, Your Honor. And the AQRV
16 analysis and the increment analysis need to be
17 run separately. And there's no authority in the
18 act or in the regulations or in any guidance I'm
19 aware of for the federal land manager to waive
20 the increment analysis. The act is pretty clear
21 that to be able to obtain a permit, the
22 applicant has to demonstrate compliance with

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1   increment. They cannot cause or contribute to a
2   violation of increment.
3   JUDGE SHEEHAN: So you're saying that
4   the state did not provide all the information to
5   the land managers at Seney and Isle Royale?
6   MR. BENDER: What I'm saying is that
7   the state did not conduct an increment analysis
8   to know whether or not the increment was
9   violated or not. Based on the model
10 concentration that they did run, the screening
11 model, it showed 8 percent, which is a pretty
12 significant number for the entire increment in
13 that Class 1 area to know whether the increment
14 itself has been violated or not. Just didn't
15 run that model to know.
16   JUDGE REICH: Okay, thank you. Mr.
17 Gordon?
18   MR. GORDON: Good morning.
19   JUDGE REICH: Good morning.
20   MR. GORDON: I'd like to reserve 5
21 minutes of the 30 minutes that I'm allotted for
22 rebuttal.

11 (Pages 38 to 41)

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1   Your Honors, Petitioner identifies
2 a whole range of issues on which they
3 disagree with the conclusions of the Michigan
4 Department of Environmental Quality. And I
5 think it's important to remember before we
6 get into the specific issues what the
7 standard of review here is. And that is that
8 they have to demonstrate that there's been a
9 clear error.
10   I think when we delve into each of
11 the individual issues, you'll find that there
12 actually hasn't been any demonstration of
13 clear error. In fact, when you look at them
14 carefully, they haven't actually shown any
15 issue at all. They've simply demonstrated
16 that they don't agree with the way the DEQ
17 went about its analysis.
18   There are a whole host of issues.
19 I'm going to present them, if it would please
20 the Court, in the order in which they were
21 arranged, if that's fine with you.
22   JUDGE SHEEHAN: As sort of a general

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1 backdrop question, the very first page of the
2 application said that the intention was for the
3 CFB to operate 100 percent on wood. Then per an
4 addendum several months later, you also repeated
5 that general thought that the primary fuel would
6 be wood. Then you turned to the fact sheet in
7 the permit and you see, as was earlier
8 indicated, coal 22 days per month. Wood
9 obviously seven or eight days. How do you
10 square not necessarily a legal issue, but how do
11 you square the proclamation of your intention to
12 use so much wood, and then, in reality, seems to
13 be anything but?
14   MR. GORDON: I think the basis for the
15 mix of coal and wood that are to be burned at
16 the facility and on which the SO2 emission
17 limits are based is based on two factors: One,
18 it's based on the limited storage capacity for
19 any fuel at the facility, be it wood or coal;
20 and two, it's based on the reality that the wood
21 fuel deliveries during those winter months will
22 be disrupted.

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1   JUDGE SHEEHAN: But if we turn in that
2 regard to storage, Mr. Kucera, could you put up
3 the facility design document submitted by the
4 state here? There's the facility.
5   Let me ask you questions, if I may,
6 Mr. Gordon, about that. In the center near
7 the bottom, you see the wood silo capacity,
8 which appears to be a fairly large area
9 compared to the coal silo, which is above and
10 to the left of the wood silo, the little
11 square building? The storage area for wood
12 generally, including the silo and to the
13 right, the handling building and the wood
14 hopper, appear much larger than the coal
15 storage area. Is that accurate that there's
16 a lot more capacity to store wood than coal,
17 as seems to be reflected here in this design?
18   MR. GORDON: Well, I think the
19 question is how many days of capacity it is.
20 And what the university submitted in its permit
21 application was that the storage capacity at
22 this site for coal and for wood is a three-day

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1 fuel supply for each of those separately. Three
2 days fuel supply of wood.
3   JUDGE SHEEHAN: Your papers did not
4 say separately. It said three days fuel supply
5 without any differentiation between them.
6   MR. GORDON: Their permit application
7 indicates that there's two silos, and that it is
8 a three-day supply for wood and a three-day
9 supply for coal. And I don't know on this map,
10 on this schematic, does it indicate that the
11 wood silo building is of a larger area than of
12 the coal silo, coal storage area? It is a silo.
13   Yes. I think the question is, is
14 there anything in the record to demonstrate
15 that the capacity is less than a three-day
16 storage capacity, as represented? And DEQ --
17   JUDGE SHEEHAN: Well, let's talk about
18 capacity. If you look to say Lot 19 up there at
19 the top and to the left -- Mr. Kucera, could you
20 slide, yes, to the left just to Lot 22, which is
21 the large area. If you could slide it the other
22 -- there we go. So Lot 19 and Lot 22 appear

12 (Pages 42 to 45)

1 both vast and empty. The area around the Ripley
2 Heating Plant in the top right corner has a
3 buffer to the top and right, but also appears
4 large and vacant. Why is it that the storage
5 capacity is so stringent and constricted, as you
6 indicate, when your own map seems to indicate
7 anything but?
8   MR. GORDON: Frankly, I don't know if
9 it's fair to conclude that those large -- those
10 maps are vacant, to be honest with you. I think
11 --
12   JUDGE SHEEHAN: There's nothing on
13 them like there is in the rest --
14   MR. GORDON: There's nothing on them
15 represented in this schematic, but in this
16 diagram --
17   JUDGE SHEEHAN: Well, that's the
18 record you gave us. What else do we have to go
19 from?
20   MR. GORDON: I think it's based on the
21 representation of the university as to the
22 diagram represents what's at the Ripley Fuel

1 Heating Plant.
2   I don't think they endeavored to
3 try to show what's on other lots. As I read
4 their application, they're not diagraming and
5 indicating every structure on adjacent lots.
6   JUDGE SHEEHAN: Well, it certainly
7 raises the question -- there was no way that
8 evidently the university really attempted to
9 really clarify for us the true facts on the
10 ground there. And what they did give us appears
11 to show that there's a lot less storage
12 capacity.
13   MR. GORDON: I don't think so. I
14 think the representation on the record is that
15 the capacity of what is for storage for each of
16 those fuels is three days. The DEQ examined it.
17 It looked at that issue and that -- there's
18 nothing to contradict that other than, I
19 suppose, a potential surmise that maybe you
20 could have something on some adjacent lot. But
21 that's not -- there's nothing in the record to
22 actually demonstrate and overcome to show that

1 there was clear error in that regard.
2   JUDGE SHEEHAN: Well, it could well be
3 that it's true there is a three-day storage
4 capacity for the areas denominated for storage.
5 But it doesn't mean that there aren't other
6 areas available for storage that simply weren't
7 used.
8   MR. GORDON: You know, I suppose we
9 could speculate that there, you know, someplace
10 a block away, two blocks away, there may be. As
11 to what that would mean in terms of
12 reconfiguring the plant in terms of being able
13 to then have a conveyor to actually have the
14 wood from a facility two blocks away, a storage
15 facility two blocks away, being able to feed
16 that into the boiler, those are all issues that,
17 frankly, were not presented in the record. I
18 think the question here is --
19   JUDGE REICH: Well, who's burden is
20 it? I mean, if a central part of the BACT
21 analysis relates to storage, is there really
22 someone like Sierra Club's burden to find and

1 make arguments for additional storage or is it
2 not your burden as the permit issuer to explore
3 what possibilities exist for storage that would
4 allow for a more stringent limit and make a
5 determination as to whether those possibilities
6 are there or not?
7   MR. GORDON: I think when you apply
8 that question to this case, the burden is on the
9 Sierra Club here. Here, the record demonstrates
10 the permit application --
11   JUDGE REICH: I'm not talking about
12 the appeal stage. I'm talking about at the
13 basic permit issuance stage.
14   MR. GORDON: Permit issuance stage.
15 The information presented to the DEQ is that the
16 capacity of storage at this facility is three
17 days of wood here.
18   JUDGE REICH: And you have no
19 independent obligation to verify that
20 information?
21   MR. GORDON: No, DEQ reviewed it and
22 considered whether there was room for more

13 (Pages 46 to 49)

1 storage capacity at this facility.
2   JUDGE REICH: So you did consider
3 whether there was room for more? You did an
4 independent analysis to that and that
5 independent analysis is part of the record?
6   MR. GORDON: I think what DEQ -- it
7 shows that the DEQ reviewed it, reviewed their
8 permit application. The response to comments
9 says that based on the review of it, they were
10 satisfied that in fact, that was the capacity.
11 In those circumstances, I think it's incumbent
12 upon the Petitioner to say no, there's something
13 wrong with that. You didn't actually look at X,
14 Y, and Z. And if you had looked at X, Y, and Z,
15 there would be clear error.
16   JUDGE REICH: Do you know --
17   MR. GORDON: And they haven't done
18 that here.
19   JUDGE REICH: Is there anything in the
20 record that actually is an analysis, or is there
21 just the recitation that you looked at it and
22 reached this conclusion?

1   MR. GORDON: I think the information
2 that's in the record as to the capacity is,
3 frankly, the information, primarily what's in
4 there, in their permit application as to how the
5 facility will be configured, the fact that
6 there's not only fuel storage, but you have to
7 take into account when you have fuel storage how
8 you're going to feed that fuel on the facility
9 grounds into the boiler.
10   I mean, there's a schematic I
11 think, and the diagram reflects not only the
12 silos, but also the actual area that you need
13 for delivery, the area that you need to then
14 store it, the area that you need to take it
15 from the storage and feed it into the boiler.
16 When you take all of that into account, I
17 think the record shows that in fact, the
18 capacity is a fuel storage capacity.
19   JUDGE REICH: Can I ask a different
20 question while I still have the floor? Do you
21 agree with the position put forth by Sierra Club
22 -- and if not, why not -- that if this

1 application had come in describing the boiler
2 precisely the same way it did, it never
3 mentioned wood, that as part of the BACT
4 analysis, you would have had to consider wood as
5 an option in terms of fuel?
6   MR. GORDON: You know, I think the
7 question as to other -- given the physical
8 circumstances and the physical capabilities of
9 the boiler, whether it can in fact burn other
10 fuels is something that you would then -- you
11 have to perform doing a top-down BACT analysis
12 as to the technological availability. Is it
13 available? You know, the technological
14 feasibility -- I mean, CFBs can burn other
15 fuels. I think that's one of their advantages.
16   Then the question is, I think you
17 would need to perform your top-down BACT
18 analysis.
19   JUDGE SHEEHAN: One other question
20 while I have the scheme up there, the design.
21 You indicate that there's no room on-site to
22 take anything but Marquette or Presque coal,

1 which I'll refer to as MPI coal. There seems to
2 be no differentiation in even the coal storage
3 area between one kind of coal and another.
4 Where does the statement in the record come to
5 the effect that there's no room for any other
6 kind of coal but those two?
7   MR. GORDON: I don't think the
8 contention is that there's no room or -- for any
9 other type of coal. I think what the university
10 represented in its application was that it was
11 going to burn coal from two other sources. I
12 shouldn't say "two other," from two sources:
13 Either the Wisconsin Electric Presque Isle power
14 plant or the other utility that's in the area,
15 the Marquette Board of Light and Power. And so
16 the analysis then in terms of we're getting into
17 this issue as to who are the -- was the SO2
18 emission limit based on the lowest sulfur --
19   JUDGE SHEEHAN: Wait, let's talk about
20 your statement. You used the word "will," which
21 does come from the permit application. It does
22 come from the evaluation form. Both say that

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1 the coal burned "will" be Marquette or Presque
2 Isle coal. What kind of inquiry did you all do
3 to look into whether other coals outside of
4 those two plants would be available? Why was it
5 the focus from the beginning, apparently, only
6 on those two and no more?
7   MR. GORDON: I think the focus is on
8 those two because those are the two supplies of
9 coal that are available in Marquette.
10   JUDGE SHEEHAN: How do you know that
11 if you haven't done an analysis to see if there
12 are other coals available? I can't believe that
13 only those two plants in the upper North
14 Peninsula there would be the only supplies
15 available. There are coal sources all over that
16 region, and they're even referred to in your
17 evaluation form. You considered other coals
18 from other places. Why only Marquette or
19 Presque Isle at the end of the day and no more
20 beyond those two?
21   MR. GORDON: I think the answer is
22 because those were the two supplies that were

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1 provided -- that were identified by the company.
2   JUDGE SHEEHAN: Well, that doesn't
3 sound like an analysis. It sounds like a fait
4 accompli.
5   MR. GORDON: I don't -- first of all,
6 I don't know if there was ever any -- the other
7 coal supplies we're talking about, looking at
8 coal to be shipped in from Wyoming or from other
9 sources, I mean, the reason why we're looking at
10 coal that can be provided from those two places
11 is because they can be trucked in. And given
12 the storage capacity, again, to be able to just
13 place stuff in silos, we're looking at what are
14 the coal supplies that can be provided by truck
15 delivery during the wintertime?
16   JUDGE SHEEHAN: But are these are the
17 only two within range for it to be trucked in?
18 I understand the distinction you're making, but
19 I don't even hear you saying you looked to see
20 whether there were other sources within that
21 range where it could be trucked from, as opposed
22 to you took it as a given that that's where it

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1 would come from because that's what the
2 application set forth.
3   MR. GORDON: I think those were the
4 two that were looked at because if you start to
5 truck and rely on fuel deliveries from sources
6 that are more than the roughly quarter to a half
7 a mile distance from this plant to Presque Isle
8 Power Plant, or more than the roughly one mile
9 distance from this plant to the Marquette Board
10 of Light and Power, you're going to start run
11 afoul of the same problems regarding winter
12 supply disruptions.
13   If you say, well, you could get
14 something from a coal supply that's 50, 75,
15 100 miles away, you're going to have some of
16 those same problems. The whole point here is
17 that during the winter weather, where can the
18 university be assured of being able to get a
19 backup fuel supply? And it's those wood
20 supplies --
21   JUDGE SHEEHAN: And where is it
22 indicated --

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1   MR. GORDON: Are disrupted.
2   JUDGE SHEEHAN: Where in the record is
3 it indicated what the distances are between
4 Marquette, Presque Isle, and NMU?
5   MR. GORDON: You know what? They're
6 not.
7   JUDGE SHEEHAN: I saw none.
8   MR. GORDON: I don't think there is
9 anything in the record. I think it is something
10 that I'm representing to you here. If you were
11 to go on the Internet, on to MapQuest, you'll
12 see that in fact, that is true. It's easily
13 deducible from, you know, available information.
14   JUDGE SHEEHAN: And it is part of the
15 representation you're making that it's not on
16 the record. Does that also include that these
17 are the two closest sources from which they
18 could obtain coal?
19   MR. GORDON: I'm not prepared to
20 represent that there isn't. Those are the only
21 two that I know of, yes. Yes. I don't want to
22 say something that is factually inaccurate

15 (Pages 54 to 57)

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1 because --
2   JUDGE SHEEHAN: Well, I appreciate
3 that.
4   MR. GORDON: Yes.
5   JUDGE SHEEHAN: While we're on the
6 issue of the stringency of the BACT analysis,
7 Mr. Kucera, could you put up the printed
8 evaluation form document? Thank you.
9   About four paragraphs down, the
10 paragraph beginning, "One of the lowest," we
11 see that in the first few lines there, you
12 had other options that were flagged. This
13 270 megawatt plant with.022 pounds, 30-day,
14 and.05 pounds, 24-hour -- both lower than the
15 NMU ultimate limit using.4 sulfur coal or.9
16 percent sulfur coal, both of which are lower
17 than what we had here.
18   Then skipping down to the paragraph
19 with the numerical figures running down the
20 left margin, the last point examined there,
21 which most like NMU is a CFB boiler and no
22 scrubber, as all the other ones in that same

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1 column are --
2   MR. GORDON: I'm trying to follow
3 along. Which --
4   JUDGE SHEEHAN: The.103 at the bottom.
5   MR. GORDON: Yes.
6   JUDGE SHEEHAN: The preamble for that
7 whole section there aligns these facilities
8 pretty closely with NMU. And the fact that they
9 both have -- all have boilers and not have
10 scrubbers, like NMU. Here again, we have a
11 permit limit that's better in terms of sulfur; a
12 lower sulfur fuel,.45. And this permit of all
13 the others is closest in size -- 44 megawatts to
14 NMU -- and it's the most recent, 2006.
15   So this seems quite close to the
16 NMU situation. So there's that
17 consideration, plus the one I just mentioned
18 from three paragraphs above. Both of these
19 other facilities, or both of these other
20 analyses seem to provide some pretty good
21 BACT limits for NMU. But for no reason
22 that's apparent from this form, they weren't

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1 accepted by NMU. Why?
2   MR. GORDON: I think the difference is
3 the percent sulfur. It's that the percent
4 sulfur that the university will be receiving
5 from the Presque Isle Power Plant in particular
6 has -- is by permit authorized to have a sulfur
7 content of up to 1.5 percent sulfur by weight.
8   JUDGE SHEEHAN: But the whole point I
9 thought of doing the BACT analysis was to show
10 you a universe of other possibilities and help
11 drive NMU to that point, not to say we're only
12 going to focus on two nearby coals, none other,
13 and that's the end of it. That doesn't sound
14 like an analysis. It seems like a conclusion
15 before an analysis.
16   MR. GORDON: Well, I think we're
17 circling back to the previous discussion which
18 is that is.4 or.5 percent sulfur coal an
19 available control option? To put it in terms of
20 a BACT discussion, I think the answer that I'm
21 representing today is it's not an available
22 option.

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1   JUDGE SHEEHAN: Well, even between the
2 two coals you say you will use, Marquette and
3 Presque Isle, Presque Isle is 1 percent sulfur
4 and Marquette is 1.5 percent. So there's a
5 difference there, reversed.
6   MR. GORDON: Or the other way around.
7   JUDGE SHEEHAN: Okay. We saw them two
8 different ways in the record. I'm not sure
9 which is accurate, but one is higher than the
10 other. But you elected to use only the higher
11 as the sulfur limit driving the emission limits.
12 So why was that? Why not go for the lower
13 sulfur coal as the baseline rather than the
14 higher sulfur coal?
15   MR. GORDON: Because of the
16 university's position that it's going to be --
17 those are the two available supplies, and that,
18 therefore, you're looking at the maximum. What
19 is available to you, though? As to whether or
20 not -- I will defer to the counsel for Northern
21 Michigan as to whether or not it would be able
22 to get all of its coal at all times during all

1 winter months from Marquette Board of Light and
2 Power. My understanding is that that's not the
3 case, and that at some times, it will need to be
4 able to receive coal from the Presque Isle Power
5 Plant.
6 And that therefore --
7 JUDGE WOLGAST: Is there anything on
8 the record that reflects the availability one
9 way or the other?
10 MR. GORDON: I think what's in the
11 record is really what's in the permit
12 application, and then what's in the response
13 that really just sort of reinforce or restate
14 what I've just said.
15 JUDGE REICH: Following up on what
16 Judge Sheehan is saying, the common thread
17 sounds to me and in many of your responses is
18 that you set out to set limits that basically
19 would allow NMU to do what NMU had already
20 decided it wanted to do. And what I'm not
21 hearing is any element of technology forcing or
22 anything else that is supposed to be the essence

1 of BACT. Why am I incorrect in the way I'm
2 hearing what you're saying?
3 MR. GORDON: Well, I don't think it's
4 accurate to say that the department is just
5 putting a rubber stamp on what the permit
6 application is. I think they are looking at it,
7 seeing if it makes sense, doing their own
8 review, and in this case, as to the percent
9 sulfur content of the available fuels, there's
10 agreement that is what is available.
11 JUDGE SHEEHAN: Why is it then that in
12 the original permit application you -- what
13 3.5 percent sulfur coal was proposed, and then
14 in response to perhaps comments from the state,
15 the sulfur limit went down to 1.5 percent
16 sulfur. Yet the permit, the ultimate emission
17 limits stayed the same, even though the coal,
18 the sulfur content of the coal came down rather
19 dramatically.
20 MR. GORDON: I think the answer to
21 that is that the DEQ went back and spoke with
22 the company and communicated with them as to

1 where are you going to be getting your coal
2 from? And the answer is --
3 JUDGE SHEEHAN: So the coal is
4 cleaner, but the ultimate emission limit is no
5 better than in the original dirtier coal. How
6 does that work?
7 MR. GORDON: I'm not sure of the
8 answer to that.
9 JUDGE SHEEHAN: Going to weather
10 conditions.
11 You talked about snows and bad
12 weather interrupting fuel supplies. Why is
13 it that snow only somehow impedes the
14 delivery of wood, and coal seems to make it
15 through to the tune of an order of 3-to-1
16 more coal to wood? If weather is a problem
17 for any delivery, fuel or coal, why is it
18 that coal seems to make it through 22 days a
19 month and wood doesn't?
20 MR. GORDON: Why is it that coal is
21 able to be delivered?
22 JUDGE SHEEHAN: Yes. Coal somehow

1 seems to surmount the weather difficulties you
2 spoke of.
3 MR. GORDON: I think it's the
4 proximity of the coal supplies.
5 JUDGE SHEEHAN: Well, where are the
6 wood supplies coming from?
7 MR. GORDON: The record shows that the
8 wood supplies is from independent suppliers that
9 were going to be bringing the wood in on logging
10 trucks from the surrounding area.
11 JUDGE SHEEHAN: And to my knowledge,
12 looking at the record, I see no indication
13 whatsoever in the record of where those wood
14 suppliers are. They could be off the front gate
15 of Ripley for all the record indicates, or they
16 could be 300 miles away. Where in the record do
17 you indicate where those suppliers are so that
18 we can understand why they might be more
19 adversely affected by the weather than the coal
20 --
21 MR. GORDON: In the permit application
22 itself, at page 4, it said, "Wood chips are to

17 (Pages 62 to 65)

1 be delivered by truck in bulk from independent
2 suppliers." I think that is in the permit
3 application itself at page 4.
4   JUDGE SHEEHAN: It doesn't help where
5 they are, whether they're 2 miles or 200 miles
6 out.
7   MR. GORDON: And then in the response
8 to comments, at page 12, it says, "A delivery of
9 40 tons of wood chips will occur once a day,
10 except on weekends, on routes used by logging
11 trucks." I think --
12   JUDGE SHEEHAN: Again --
13   MR. GORDON: "The routes used by
14 logging trucks," I mean, I think the -- what was
15 intended to be communicated by that -- by both
16 of those together is that the wood is not coming
17 from some stockpile inside Marquette. It's
18 coming from -- or outside the gate, as you say.
19 It's coming from independent suppliers that are
20 outside of the city and out in the Upper
21 Peninsula. And those are the two references in
22 the record.

1   I looked for -- I asked that same
2 question myself and wanted to find out where
3 they're getting their wood from.
4   JUDGE SHEEHAN: The beating heart of
5 the BACT analysis here seems to be Operational
6 Memorandum No. 20. That's --
7   MR. GORDON: I'm sorry, could you
8 repeat that? I was just noticing my yellow
9 light went on.
10   JUDGE SHEEHAN: I'm sure we'll go
11 over, so don't worry about that. The
12 Operational Memorandum No. 20 seems to be the
13 guiding light for how the state and how
14 facilities do the BACT analysis. Is that
15 correct? It was cited on the --
16   MR. GORDON: I have not reviewed
17 Operational Memo No. 20, to be honest with you.
18 What DEQ does is perform its BACT analysis. I'm
19 vaguely familiar with that.
20   JUDGE SHEEHAN: Well, it's your
21 document.
22   MR. GORDON: Yes.

1   JUDGE SHEEHAN: It's Michigan
2 Department of Environmental Quality, Air Quality
3 Division. It's your product.
4   MR. GORDON: Yes.
5   JUDGE SHEEHAN: On page 33 of the
6 permit application, it says that that's what
7 guides the BACT analysis. My question is that
8 after making that statement at least
9 rhetorically supportive of your guidance, it
10 says that the use of this guidance allows the
11 applicant to "circumvent the rigorous approach"
12 set forth in the NSR Manual.
13   Is it true that your own document
14 here appears to be taking a far different
15 path than the NSR Manual takes with its
16 five-step process for the top-down BACT
17 analysis?
18   MR. GORDON: I don't think it's meant
19 -- if the permit application used the term
20 "circumvent," I don't think that is what's
21 intended.
22   I think there -- my recollection

1 from that operational memo, that there are
2 certain -- if you want to call them
3 preliminary analyses, screening approaches to
4 see if a proposed emission limit satisfies
5 BACT, for example, reviewing what information
6 might be in the RACT/BACT/LAER clearinghouse
7 is my recollection, but that was one of the
8 sort of preliminary analyses that applicants
9 can use in order to -- first, as an initial
10 matter, see what other facilities are doing,
11 and whether their proposed emission limit
12 meets that threshold.
13   JUDGE SHEEHAN: The final few
14 paragraphs of your memo, after quoting at length
15 the NSR five-step process, then goes on to say
16 with reference to the NSR five-step process that
17 the AQD should "avoid" the NSR Manual because
18 the NSR Manual is too complex and it's difficult
19 to agree upon and it's time- and
20 resource-intensive, et cetera. It seems like a
21 repudiation of the NSR Manual.
22   MR. GORDON: Well, you know --

18 (Pages 66 to 69)

1   JUDGE SHEEHAN: Your own document; not
2 the permit application, but DEQ's --
3   MR. GORDON: I think that guidance
4 document was written, as I recall, back in the
5 -- what is it? At least in the early to
6 mid-'90s, if not before.
7   JUDGE SHEEHAN: 2005. Effective date
8 August 9, 2005.
9   MR. GORDON: Effective date -- okay, I
10 apologize then. That -- for one thing, that
11 document -- there's not any allegation that that
12 was what happened in this case. And so --
13   JUDGE SHEEHAN: You've referred to it
14 throughout the permit application.
15   MR. GORDON: But there was a -- but
16 the permit application lays out the BACT
17 analysis that they did, and there's not any
18 alleged circumventing of any kind of five-step
19 BACT analysis here. They actually lay forth
20 that. It may be in their background section of
21 their discussion, they talk about what that
22 operational memo says. But actually when you

1 look at what the BACT analysis that was
2 performed by the university here, it's not that
3 they are saying, oh, let's just do a quick and
4 dirty and we'll be done. They're actually doing
5 a BACT analysis.
6   JUDGE SHEEHAN: I think that's
7 debatable.
8   JUDGE REICH: Can I ask, this is an
9 obvious question, which is, if the concern as to
10 availability of fuel was based on weather
11 conditions at certain times of the year, did you
12 not consider or did you consider why did you not
13 adopt limits and more precisely tailor to the
14 concern you have? Why does the public and the
15 facility, the plant, have to live with the
16 limits in June based on snows in January?
17   MR. GORDON: That argument that was
18 raised by the Sierra Club in their petition for
19 review is not an argument that was raised during
20 the public comment period. Accordingly, the
21 Department didn't respond, didn't have it
22 presented to it, didn't have an opportunity to

1 correct it.
2   JUDGE REICH: The Department appeared
3 to know about it because the Department made the
4 argument that snow gets in the way and snow is
5 the reason why we have to have this particular
6 allocation of coal versus wood. But it doesn't
7 snow in July, so why does your own reasoning not
8 support a different result?
9   MR. GORDON: Well, I think there's two
10 different issues that overlap. One is why isn't
11 the permit, according to Sierra Club, based on
12 100 percent wood and 0 coal? And the answer to
13 that is because of fuel delivery disruptions for
14 wood during the wintertime. The argument is, if
15 you agree that some coal will be needed because
16 of the severe winter weather, then how much wood
17 and how much coal should the limit reflect? And
18 the answer to -- and that -- the fact sheet that
19 was put out to the public at the beginning of
20 the public comment period laid out very
21 specifically that the limit is based on 22 days
22 of -- a mix of coal and wood.

1   And yet Sierra Club, petitioner
2 here, did not raise that point in public
3 comments. Had they done that --
4   JUDGE REICH: So you're saying that
5 issue was not properly before us.
6   MR. GORDON: That's right. It wasn't
7 preserved for appeal. Had they done that, the
8 DEQ would have had the opportunity to address
9 it, but it was not properly before the board.
10   JUDGE SHEEHAN: Turning briefly to the
11 redesign argument and the very strong emphasis
12 in the Clean Air Act itself, Section 169, that
13 clean fuel needs to be considered, and as the
14 Sierra Club 7th Circuit case reaffirmed that
15 clean fuels are not to be read out of the Act
16 merely because "some adjustment" to technology
17 is required, what efforts did NMU make here to
18 push the clean fuels envelope and do some
19 adjusting to pull in as clean a fuel possible?
20   MR. GORDON: Well, I think the
21 argument that the Sierra Club is making, and to
22 answer your question, is what efforts should

19 (Pages 70 to 73)

1 have been made to, for example, examine whether
2 coal from the Powder River Basin -- this is
3 their specific argument -- should have been
4 brought here, brought to this plant. And I
5 think the answer to that is that it would
6 redefine the source. And we rely in our brief
7 on the Prairie State decision in saying that for
8 that to occur, the fuel would have to be
9 delivered to the facility not by truck, but from
10 -- but not by truck, from these two local
11 suppliers -- Presque Isle Power Plant and
12 Marquette Board of Light and Power -- but from
13 someplace else. It's not clear if it's by rail
14 or by some other means.
15 And so for the facility to be able
16 to, for example, accept Powder River Basin
17 coal, for example, by rail, they would have
18 to construct a railroad spur.
19 JUDGE SHEEHAN: Where is that said? I
20 mean, it sounds fine now, but there's nothing in
21 the record to say you thought of that and you
22 said those things and you've actually thought

1 about it and produced a viable analysis to
2 support what you're saying here in court.
3 MR. GORDON: I think it gets back to
4 whose burden is it in order to show that there
5 are in fact alternatives that DEQ failed to
6 consider.
7 JUDGE SHEEHAN: The Clean Air Act says
8 it's your burden.
9 JUDGE WOLGAST: Another way to look at
10 it, though -- I mean, I'm particularly looking
11 at the Michigan memo, which does raise some
12 concern about how stringent they were doing a
13 top-down analysis, is that you identify
14 obviously, starting with LAER, this isn't LAER,
15 this is BACT, but -- you know, the cleanest
16 sources and the best technologies. And why
17 wouldn't both sources be considered, and then if
18 -- if -- in the later stages of the analysis you
19 found it was not economically feasible, for
20 instance, to transport Powder River Basic coal,
21 then the analysis would proceed in that fashion.
22 I don't see why it did say "design change"

1 versus -- or that it would never have been
2 considered initially -- not whether you would
3 get to the same place in the end or not, but how
4 stringent is the analysis itself.
5 MR. GORDON: The argument that was
6 presented and the Sierra Club's comments is that
7 we should -- the DEQ -- and this permit should
8 be subjected to an analysis for Powder River
9 Basin coal -- coal to somehow be delivered from
10 the Powder River Basin to this plant, stockpiled
11 at this plant, and then fed into the boilers.
12 The analysis that DEQ went through
13 was to say -- you know, as a threshold
14 matter, before we get into technological
15 feasibility and the whole five-step process,
16 there's a threshold matter -- that whole
17 analysis would entail redefining the source.
18 And that was -- and so it's not necessary to
19 say is it technologically feasible? It's
20 technologically feasible for coal to -- you
21 know, can you deliver it by rail all the way
22 to this facility?

1 JUDGE WOLGAST: Why is that?
2 MR. GORDON: Because when you look
3 back at that diagram, there's no railroads for
4 here. So you'd have to redesign that. There's
5 no space, frankly, at this facility to have a
6 coal stockpile.
7 JUDGE SHEEHAN: But you just indicated
8 earlier that that design might not contain
9 all -- the whole picture of the facility, so our
10 not knowing there's a railroad spur is
11 impossible because you just said that design may
12 not be accurate or --
13 MR. GORDON: I'm talking about what's
14 on the actual Ripley Heating Plant. It is
15 representative of what's actually at the plant
16 itself. There's not a railroad spur on that
17 diagram. And whether or not there's a railroad
18 someplace down off of that, I'm not attempting
19 to make a representation as to that.
20 But it was the DEQ's analysis, and
21 I think it's the correct analysis here, that
22 to put in a spur, to somehow make room of

20 (Pages 74 to 77)

1 which there isn't room for a coal stockpile,
2 for coal from the Powder River Basin to be
3 delivered, to then reconfigure your plant so
4 that you can --
5   JUDGE SHEEHAN: You said it's the
6 DEQ's analysis the spur can't be put in. Where
7 is that in the record? I never saw the word
8 "spur" --
9   MR. GORDON: I don't -- you're not
10 going to find --
11   JUDGE SHEEHAN: Or any other railroad
12 issues you're talking about.
13   MR. GORDON: You won't find that in
14 the record. I think you're right. The DEQ's
15 presentation of this issue is that in order for
16 Powder River Basin coal to be an available
17 option, for it to be BACT would entail
18 redesigning the source. That is in the record.
19 That's in the response to comments.
20   JUDGE WOLGAST: And then you rely on
21 the Prairie State decision for that position.
22 But it strikes me that that's a much broader

1 reading of this application were it so would be
2 a much larger reading of redesign. And what we
3 found were the 7th Circuit considered in Prairie
4 State. I mean, they are -- the power plant
5 would never have been built but for the fact it
6 was used in the contiguous and co-online
7 facility. And here you're talking about
8 reconfigurations, but I think, as Counsel
9 pointed out, the 7th Circuit didn't seem to
10 embrace any reconfiguration as equating
11 redesign.
12   MR. GORDON: I think that my review of
13 that decision was that it was -- you're right,
14 in a very, very broad macro level, I mean, the
15 plant wouldn't have been going -- a sort of
16 raison d'etre for that plant was that it was a
17 mine-mouth plant.
18   But in addition, I think an
19 important part of that analysis was that even
20 if the facility could have -- was achievable
21 in some general fashion, accepting coal from
22 some other place, it emphasized that to do so

1 would involve a physically substantial
2 reconfiguration of that entire facility. So
3 that rather than having a conveyor taking
4 coal straight from the mine and feeding it
5 right into the boiler, you'd have to have
6 some other kind of configuration for not only
7 receiving, storing it, and feeding it into
8 the boilers. I think that aspect of the 7th
9 Circuit analysis is applicable here, too.
10 The same kind of reconfiguration would be
11 applied.
12   Would it be -- is it the same sort
13 of raison d'etre argument? Is that analogous
14 here? No. But the substantial
15 reconfiguration and physical redesign of the
16 plant is what would be required, and that's
17 why it's off the table for purposes of the
18 BACT analysis here.
19   JUDGE SHEEHAN: Can we move to the
20 increment issue?
21   MR. GORDON: Yes.
22   JUDGE SHEEHAN: The regs,.21(b)(13)

1 and.21(c) seem to call for the increment
2 calculation to be based on a 24-month
3 calculation pre-mod. In this case, it would be
4 the WEPCO-PIPP facility. Twenty-four months
5 pre-mod and 24 months post-mod. And then you
6 compare those and the difference. If it's -- an
7 increase is the portion that consumes increment.
8 Why did you just simply take 1973 and 2006 and
9 compare those emissions, which seems arbitrary
10 and it's certainly not the 24-month period.
11   MR. GORDON: Well, the 1973 emissions
12 reported emissions that are prior to the major
13 source baseline date of January 6, 1975 -- then
14 the comment that was submitted by Petitioner was
15 that there were modifications made to the
16 Presque Isle Power Plant from Wisconsin Electric
17 that were not included in the analysis as -- and
18 they should have been included in the analysis.
19 Those alleged modifications took place in 1999,
20 and that's in their comments.
21   And so the most reported emissions
22 are from 2006. Michigan has its annual

21 (Pages 78 to 81)

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1 emission reporting forms, and that those were
2 -- the emissions that were reflective and
3 representative of the emissions
4 post-modification. And so that's the
5 comparison is baseline versus what is
6 increment-consuming post-baseline.
7   JUDGE SHEEHAN: But the regs seem to
8 say -- and I'm reading from the regs here
9 at.21(b)(21) -- that the average rate times per
10 year consecutive 24-month period preceding a
11 particular date, which is representative. So
12 the 24-month block, period. It seems to me what
13 the regs call for -- and you seem to have just
14 taken one year versus another year and left it
15 at that.
16   MR. GORDON: Yes. And I conferred
17 with my colleagues over at the DEQ on that
18 issue. And I said, well, why did you look at
19 just the 2006 emissions as opposed to the
20 consecutive 24-month period, which is I think
21 the point that you're getting at. And they did
22 not. I'm not going to say that they did because

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1 the record's clear that they looked at just the
2 2006.
3   But, frankly, that's not the
4 argument the Petitioner is making here. So,
5 I mean, the issue that's presented on appeal
6 in this petition for review is that all of
7 the emissions from the Presque Isle Power
8 Plant after the major source baseline date
9 should be excluded from the baseline and
10 should be considered increment-consuming.
11   The issue that there was some error
12 because he didn't take the 24-month
13 representative -- most recent 24-month
14 consecutive period as opposed to the 2006
15 emissions, frankly, was never presented to
16 DEQ. It's not raised in this petition for
17 review, and that's not the issue that I think
18 is before the Board.
19   JUDGE WOLGAST: Isn't it generally in
20 the regs that the requirements of Section 52.21
21 aren't followed here, which would include the
22 contemporaneous data issue?

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1   MR. GORDON: No, I don't think that
2 that general -- the specific issue, if you look
3 at their comments was as to this argument
4 regarding what emissions should be excluded from
5 our increment-consuming and not was the 2006
6 data wrong? In fact, actually if you look at
7 their own brief, I think they give a range of
8 what emissions should be excluded, and they
9 relied on that same 2006 Maer's, M-a-e-r,
10 report. So I don't think -- that issue was not
11 presented in there, in their comments or in the
12 petition for review. And so then it's not
13 preserved for appeal.
14   But this -- you know, the argument
15 anyhow, and I don't mean to beat this, but
16 the -- they're essentially wanting to have
17 the Board ignore that portion of the rule
18 that says emissions from any major source on
19 which construction commenced after the major
20 source baseline bid -- they'd have them
21 rewrite that provision to just say -- what is
22 increment-consuming? It's just actually

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1 emissions from any major stationary source.
2 It doesn't say that. It has that important
3 second phrase: from any major source on which
4 construction has commenced after the major
5 source baseline date. They're essentially
6 asking you to ignore that second phrase and
7 rewrite it, and that's not the way it's
8 supposed to be interpreted. And the workshop
9 manual doesn't interpret it that way either.
10   JUDGE SHEEHAN: Okay. Can we go to
11 modeling? We discussed earlier, of course, what
12 the Sierra Club is driving at in terms of
13 getting down to hourly limits or very close to
14 hourly limits to meet the NAAQS and increment
15 compliance standard average periods. Although
16 your response to comments really didn't provide
17 much information at all, you just said that
18 hourly emissions are limited by the size of the
19 equipment. Sounds rather nonresponsive
20 actually. Your brief went into more detail and
21 pointed to places in the record where you say
22 you had done the calculation to the tune of 87

22 (Pages 82 to 85)

1 or 88 pounds per hour, to take the SO2 example

2 How is it -- I'm looking at page 24

3 of your application where that calculation

4 was done. You say -- even accepting as true

5 that it is 87 or 88 pounds per hour, you say

6 in the footnote to that chart on page 24 that

7 it's based on a 92 percent reduction. I

8 presume that's the limestone reduction

9 referred to elsewhere.

10 MR. GORDON: You're referring to the

11 permit application?

12 JUDGE SHEEHAN: Permit application,

13 page 24.

14 MR. GORDON: Twenty-four, thank you

15 JUDGE SHEEHAN: The chart, Table

16 4.4-1. Okay, have that?

17 MR. GORDON: Thank you, yes.

18 JUDGE SHEEHAN: Footnote 1 premises

19 the calculation on 92 percent reduction. Where

20 is it enforceable in the permit that there will

21 be this 92 percent reduction so that that figure

22 has meaning or reality?

1 MR. GORDON: The 92 percent reduction

2 is from the -- that is the required control

3 efficiency or reduction, if you will, that is

4 set forth in the New Source Performance Standard

5 that's applicable to this facility. And I'm

6 going to -- I'm having trouble putting a finger

7 on a general condition, but it's -- you know,

8 the -- the permitee is required to -- it says

9 actually, "general condition no. 8." It says,

10 no, they're not exempt from complying with any

11 of the applicable requirements under the federal

12 Clean Air Act.

13 And so they -- to the extent that

14 there are other requirements, like fuel

15 source performance standards that the company

16 -- permit applicant has to satisfy, those are

17 -- there's a general condition that requires

18 them to do that, too. And so the 92 percent

19 reduction is something that's required. They

20 have to meet it under NSPS.

21 The Sierra Club's argument that we

22 should be looking at increment consumption is

1 that it should be based on uncontrolled

2 emissions. They point that it's not 87

3 pounds per hour, but instead it's

4 500-and-some-odd pounds per hour. And that's

5 based on an uncontrolled rate. The reality

6 is that the permit requires them to operate

7 the baghouse fabric filter at all times in

8 proper operating conditions.

9 JUDGE SHEEHAN: Well, looking more

10 deeply at footnote 1 there, the second sentence

11 of it, page 24, "The limits above are also based

12 on a 30-day rolling average." Now, Sierra

13 Club's concern was that a long-term average like

14 that can help blunt or smooth out or steer

15 spikes, one-hour, two-hour, three-hour spikes

16 that are at the core of the NAAQS increment

17 compliance standards. So how does your

18 statement that this is based on a 30-day average

19 align with the chart's seeming conclusion that

20 this is a one-hour rate?

21 MR. GORDON: I am not sure why that

22 last sentence in there says the limits -- when

1 it says they are also based on a 30-day rolling

2 average, well, that is true. There is a

3 separate emission limit base, so that is a

4 30-day rolling average. What I do know is that

5 the modeling was based on maximum hour

6 emissions. And I think -- and based on the

7 design and capacity of the plant, using a

8 baghouse fabric filter operating in the 92

9 percent control efficiency. I don't think that

10 last sentence is attempting to say that the,

11 what is it, 87.8 pounds per hour limit the --

12 not limit, emission rate that was used for

13 modeling purposes is derived from a 30-day

14 rolling average. And in fact, when you look at

15 the permit application, I don't think that that

16 is, in fact -- that's not what happened.

17 They're relying instead on what I've just said,

18 that it's an hourly rate.

19 JUDGE SHEEHAN: Now going into the

20 monitoring issue. Here, as alluded to earlier

21 when the Sierra Club was speaking, you have the

22 receptor grid layout, the 5-kilometer radius

23 (Pages 86 to 89)

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1   grid from Appendix C of the permit application,
2   which looks very tight and close to the actual
3   NMU site. But what you offered up in your
4   pleadings was the background concentration
5   sheet, the so-called August 21, 2006 e-mail that
6   I presume MDEQ sent to NMU to satisfy the
7   ambient air monitoring requirement.
8   So are you relying on the -- is
9   your analysis based on a 5-kilometer study or
10   on the background concentration study, which
11   seems far vaster in terms of distance from
12   NMU?
13   MR. GORDON: Relying on the
14   information that DEQ sent them in that August
15   2006. I don't believe that this receptor grid
16   layout diagram is really to what is the
17   background concentration for determining
18   increment consumption here and in Marquette. I
19   think it's for a different purpose altogether.
20   JUDGE SHEEHAN: Okay. Well, then
21   turning to the back of the concentration sheet,
22   it shows us distances of NMU's as close in as or

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1   far out, depending on how you look at it, as
2   65 kilometers up to about 316 for lead in
3   Milwaukee. How is it that distances of this
4   scope, so far out or close in depending on your
5   point of view, satisfy the NSR Manual standards
6   for monitor location, data quality, and so on?
7   MR. GORDON: The request came in in
8   the summer of 2006. The data that was provided
9   by DEQ is for the most recent three years.
10   Information you'll see on that same sheet, that
11   is 2003, 2004, and 2005. So I don't think
12   there's any real dispute as to whether or not
13   the data that DEQ provided to them is current or
14   not.
15   JUDGE SHEEHAN: But the manual lays
16   out very strict requirements about how you
17   satisfy currency and location and quality.
18   Detailed requirements. And all we've got -- we
19   have from you is a one-page document that
20   doesn't seem to address any of them at all. It
21   just throws out these numbers without any
22   analytical foundation for them.

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1   MR. GORDON: Right. Is there anything
2   written in the record where there's something
3   from DEQ saying that it actually looked at --
4   presented a written analysis that says this --
5   these -- is current? No. I mean, it just
6   presented it to them because it's current.
7   Similarly, is there any -- something, a written
8   document laying out that it looked at location
9   and accuracy?
10   And the answer -- and I think what
11   it is, is it's basically, it is implicit and
12   demonstrated from what actually happened
13   here. The company -- excuse me, the
14   university -- submitted their request for
15   data. They knew what the requirements were
16   that needed to be representative of what the
17   air quality is in Marquette County and
18   Marquette at this plant.
19   DEQ reviewed the available
20   information, was aware of all those
21   requirements, and provided information that
22   it thought was representative of the air

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1   quality.
2   JUDGE SHEEHAN: But how do we credit
3   that? It looks very random and there's no
4   particular framework undergirding it that would
5   give us any confidence that it does reflect a
6   careful consideration of the location factors
7   and the currency factors and the quality
8   factors. It just looks like something thrown
9   out because somebody happened to have it, and he
10   needed to have something to check this box. Why
11   should we give it any deference? There's no
12   analysis to support that.
13   MR. GORDON: Because I think one -- I
14   think the reasonable inference is that when a
15   permit applicant asks DEQ for representative
16   data that he can use for modeling, DEQ then
17   reviews its available information, selects what
18   it thinks is representative. It doesn't just
19   select stuff and give it to the company when
20   it's random, you know. And so they selected
21   information from -- for example, Escanaba, Two
22   Rivers, Green Bay, Milwaukee because that

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1 information is representative, or even more --
2 actually, it's more conservative than the air
3 quality from Marquette because it's coming from
4 urban areas that are much, much larger and have
5 higher pollutant concentrations than what's
6 present in Marquette. But the prevailing wind
7 directions are actually not sending pollutants
8 up towards Marquette, but actually sending it in
9 areas that -- it's going to be lower in
10 Marquette than it would be here. So if anything
11 --
12   JUDGE SHEEHAN: But we wouldn't know
13 that if there's nothing in the record to tell us
14 what you're saying.
15   MR. GORDON: It is because it's
16 implicit. And I think actually --
17   JUDGE REICH: In regard to that, were
18 the issues about the representativeness of the
19 data -- relative to say, for example, location
20 of the surrogate -- were those issues raised
21 during the comment period? And if so, you know,
22 response to comments, did you not have to

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1 actually address those issues at that point,
2 even if they -- and I'm looking kind of implicit
3 up until that point? Did they not require you
4 to articulate why in fact they were
5 representative? And isn't that what we should
6 be looking to to see if the position you're
7 taking is sustainable or not?
8   MR. GORDON: I think -- excuse me, I'm
9 trying to keep track of all the different facts
10 and everything that's happening in this case. I
11 think there was -- it was raised. There was a
12 response to comments. It's at page 15, and
13 talks about how the DEQ's experience with
14 monitoring in the area -- and says the DEQ
15 didn't require pre-construction monitoring.
16 There was no written waiver requested by the
17 permit application -- by the permit applicant,
18 so he didn't lay out in detail -- go through
19 each of those three criteria that are in the
20 manual. But it was raised, it was addressed in
21 the response to comments.
22   Was it addressed in a somewhat

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1 cursory fashion? I'm not going to deny that
2 it wasn't addressed in a somewhat cursory
3 fashion.
4   JUDGE REICH: I was a little confused
5 because on the one hand -- I mean, you do say
6 there was no waiver, but on the other hand, it
7 seems like there was a waiver.
8   MR. GORDON: No, no written waiver is
9 what the response is. They didn't actually
10 submit something in writing, which would then
11 prompt the DEQ.
12   JUDGE REICH: So you think there was
13 an oral waiver at the time?
14   MR. GORDON: Well, not -- I mean, I
15 think --
16   JUDGE REICH: Or you just sort of
17 treated it as if waived?
18   MR. GORDON: When the company is
19 requesting information as to what model -- what
20 background concentrations it should use for its
21 modeling, both as to PSD increment consumption
22 and NAAQS, and the DEQ provides this

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1 information, it's saying, you know -- and then
2 you look to see if the modeling shows that it's
3 not exceeding the significant impact levels and
4 then a full-blown increment analysis isn't
5 needed because instead, you've satisfied some
6 threshold level on the preliminary analysis.
7   I just want to raise one more point
8 here. I think -- I think that the exchange
9 of information, the request and then the
10 providing of the data here, I don't think
11 that rises to the level of clear error, you
12 know. I mean, what could happen is if you
13 were to remand on this issue, what would
14 happen is that the DEQ would then write a
15 letter, as it has done with other applicants
16 where they have actually requested something
17 in writing, saying, yep, it needs
18 currentness, it needs accuracy, and it needs
19 monitoring location.
20   Remand is not appropriate when the
21 permitting of an agency is simply going to
22 restate the explanations that are offered on

1 appeal. And where there's explanations --
2   JUDGE REICH: Just out of curiosity,
3 when you write letters like that, is that all we
4 say or do we say it needs it because? Is there
5 any explanation in those letters as to how
6 you've determined any such criteria, or is it
7 just recycled --
8   MR. GORDON: I think it lays out the
9 same things that I've just laid out here. They
10 are -- it is current because it's 2003, 2004,
11 2005. It's representative because those monitor
12 locations are from areas where the air -- the
13 pollutant concentrations are at least as high --
14 are higher, in fact, than what they would be at
15 Marquette; and that the prevailing wind
16 directions are such that it was -- it's going to
17 be less than it is in Marquette; that those
18 monitors are actually accurate regarding the
19 number of the monitors that were used, the
20 accuracy of the monitors that were used, that
21 the quality of that data is sufficient.
22   The DEQ lays out in writing exactly

1 what I'm stating here today.
2   JUDGE SHEEHAN: Is it true that the
3 monitoring was not done for CO and PM and NOX
4 because the SIL or the SMC line wasn't
5 triggered? Is that accurate?
6   MR. GORDON: Yes.
7   JUDGE SHEEHAN: Then where is it in
8 the record that shows how you decided that that
9 line was not crossed and no analysis needed to
10 be done?
11   MR. GORDON: It's in their permit
12 application. I don't have it in front of me. I
13 think in the modeling file, there is some little
14 -- DEQ taking the information that was provided
15 to the agency by Northern Michigan University
16 and determining whether or not in fact those
17 significant impact levels were exceeded. And if
18 they're not -- the preliminary analysis is
19 sufficient.
20   JUDGE SHEEHAN: Thank you. Mr. Finto?
21   MR. FINTO: Good morning. I thought I
22 might pick up first with the fuel issues since

1 there was some discussion about that. The BACT
2 analysis that needs to be performed on a
3 case-by-case basis, on the project that was
4 proposed by the applicant. And in this case, I
5 think the case-by-case is more important that it
6 is in a usual case. If you look at the map
7 behind me, you can see this is on the southern
8 shore of Lake Superior. It's far from the
9 north, and there's been some questions raised
10 about the weather. I think what's happening in
11 many instances is people who live up there day
12 to day have some understanding of what goes on
13 and perhaps don't think about the fact that they
14 need a document and all the various details.
15   With respect to the case-by-case
16 analysis, the specific factors are that this
17 is a rural location. This is a dedicated
18 plant. It's not going to be tied into the
19 grid. It has a very harsh climate in the
20 wintertime. There's a small slip space to
21 store fuel. You saw the map and you asked
22 questions. There's a parking lot there.

1 There is a staging area, which is basically
2 trucks turn around in that area when they're
3 delivering things. So there is limited space
4 there.
5   These utilities are less than a
6 mile away. In terms of thinking about the
7 fuel supply in this case, we have an amount
8 of wood up there. It can be gotten from a
9 lot of locations. It's going to have to come
10 in to the plant from a lot of locations to
11 supply a 10 megawatt plant.
12   The coal, on the other hand, needs
13 to come from nearby sources in the wintertime
14 because of the weather. One of the things
15 that's not in the record, but the fact of the
16 matter is that the utilities get their fuel
17 by barge. That barge will stop running in
18 November, so they've got to stop and
19 stockpile for the wintertime.
20   The university has been greatly
21 accommodated by these utilities. In fact, if
22 they didn't have this accommodation -- and

26 (Pages 98 to 101)

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1 someone mentioned the Prairie State case --
2 this plant would not be built without that
3 accommodation from those two utilities in
4 this case. Because you simply can't run the
5 risk of not having fuel in a location like
6 that.
7 JUDGE SHEEHAN: It was said certain of
8 the facts you just provided us are not in the
9 record. If it's not in the record, what are we
10 supposed to do with that? It should be in the
11 record. If it's not, how can we consider it?
12 MR. FINTO: I think it is in the
13 record to a certain extent, and that is they
14 talk about the harsh weather and they explain
15 the fact that deliveries are difficult in the
16 wintertime, that it will be very difficult for
17 the wood to come in. That's why we have the
18 backup coal --
19 JUDGE SHEEHAN: But why isn't it
20 difficult for the coal to come in?
21 MR. FINTO: I think it's -- one of the
22 points I just mentioned is the fact that the

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1 utilities are nearby. They're in Marquette.
2 JUDGE SHEEHAN: They weren't told
3 that. The record shows nothing to that effect.
4 MR. FINTO: I understand. I
5 understand. But I'm just saying if that is part
6 of what the understanding is, if this is an
7 accommodation by these local utilities, they're
8 in the city itself --
9 JUDGE SHEEHAN: You make a number of
10 points in your brief on the redesign issue, that
11 there were would be transport difficulties,
12 stockpile difficulties, boiler feed
13 difficulties, none of which I saw were in the
14 record. But is there not some adjustment, as
15 Judge Posner put in the Sierra Club case, some
16 adjustment that could be made to deal with the
17 realities you say are out there on the ground to
18 get cleaner fuel?
19 MR. FINTO: I think the answer with
20 respect to bringing the wood waste, it is on the
21 record there were complaints about odor. They
22 didn't want stockpiles of wood everywhere. They

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1 wanted it in silos in certain locations. So
2 that was an accommodation that was made. So
3 we've got certain limitations on just
4 stockpiling wood.
5 JUDGE SHEEHAN: Let me ask it this
6 way. What is your argument for what NMU did to
7 accommodate the Clean Air Act's mandate that
8 clean fuels be considered?
9 MR. FINTO: I think basically if you
10 look at what they have proposed here, it is a
11 very clean plant. They're talking about burning
12 a renewable fuel with wood, which everybody I
13 think has to agree is cleaner than coal. They
14 said this is our primary fuel. If you look at
15 the source obligation rules, they've got to
16 construct that plant and operate it in
17 accordance with their current application.
18 JUDGE SHEEHAN: But it's not the
19 primary fuel if you look at the permit, which
20 says 22 days in a month are allowed for coal.
21 So rhetorically, yes, it sounds great for wood,
22 but the facts don't seem to back that up when

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1 push comes to shove.
2 MR. FINTO: I think what -- excuse me.
3 I, you know, think what happened, Your Honor, is
4 that if you're looking at the worst-case
5 scenario, what do we have to permit here? And
6 that's what they looked at. They said, look, if
7 we're going to burn wood, that's not going to be
8 the issue. When we burn coal, that's our worst
9 case, that's what we have to look at the
10 reasonably foreseeable workspace scenario, and
11 that's what we're permitting here. And that's
12 why it's based on burning coal.
13 Now, the preference of the
14 university, without a doubt, is to burn wood
15 whenever they can.
16 JUDGE SHEEHAN: Well, do you drive
17 down to the worst-case scenario, which could be
18 very dirty fuel, or do you drive up to BACT, the
19 best available? Which is it? It sounds like
20 there's a tension there.
21 MR. FINTO: I think that there is a
22 certain amount of tension when you're looking at

27 (Pages 102 to 105)

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1 fuel flexibility in these cases. I think that
2 what we're looking at here is a situation where
3 this plant has complied with the PSD
4 regulations. It could burn -- the BACT analysis
5 indicates that this is -- the numbers from the
6 initial indication for BACT. The dispersion
7 model is done. It shows that the plant will not
8 cause or contribute to a violation of NAAQS. So
9 it does satisfy the requirements of the
10 lawmakers, too.
11   With respect to the fuels, another
12 comment was made about Prairie State. In
13 this case, they're sort of getting this
14 lifeline into this plant for the coal as a
15 backup from the usual utility. And it's
16 similar in Prairie State in the sense that
17 there was, in that case, a conveyor belt that
18 came from a mining plant offline into the
19 plant. And here what we have are two
20 locations in which the can get coal; they're
21 sort of at the mercy of these utilities and
22 having to supply what they have a lifeline

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1 there -- that there are really no other
2 options.
3   Given the distance, this is within
4 a mile, and those are the only options that
5 they have.
6   JUDGE SHEEHAN: I think time has
7 expired, but you had rebuttal time, is that
8 right?
9   MR. FINTO: Correct.
10   JUDGE SHEEHAN: Mr. Bender?
11   MR. BENDER: Thank you, Your Honor.
12 In response to a number of new facts that were
13 raised here during argument today, Sierra Club
14 did not have the benefit of those facts or any
15 of these analysis that apparently was implicit
16 according to DEQ. If we had, we could have been
17 more specific even in our comments. We could
18 have addressed those issues more specifically.
19 But still, I think even with the facts, if all
20 those representations made today are true, I
21 still think that the permit analysis was
22 sufficient.

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1   A number of things were identified
2 as not being possible. The two power plants
3 in town the only source of coal, you can't
4 truck it in from anywhere else, there's no
5 rail line, or a coal transfer point where it
6 can be taken off some other contractor. A
7 number of things, other possibilities, that
8 all should have been identified in step 1 of
9 the top-down BACT analysis. And if there was
10 a not possible or it's too expensive to truck
11 fuel a certain distance, all those things are
12 dealt with in a proper top-down BACT
13 analysis, either in technological feasibility
14 or a cost effectiveness or in one of the
15 later steps.
16   On the issue of increment analysis
17 and Presque Isle, DEQ suggested that Sierra
18 Club asked the Board to rewrite the
19 regulator. That's not the case. Asking that
20 the regulation be applied as it's currently
21 written. As it's currently written, it
22 states the following are not included in the

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1 baseline concentration and effective
2 applicable maximum allowable increase.
3 Actual emissions as defined in B-21 of this
4 section from any major stationary source on
5 which construction commenced. It does not
6 say emissions from the construction of. It
7 doesn't say emissions from the modification
8 increases. It says actual emissions from the
9 source. Source is defined as the unit or the
10 boiler, the entire facility in 52(21)(b),
11 definition of --
12   JUDGE SHEEHAN: So what does that do
13 to the statement in the manual on page C-10, the
14 NSR manual, that emission increases that consume
15 increment are those occurring after the
16 baseline.
17   MR. BENDER: It's true for resource
18 baseline data. The increases that occur
19 afterwards at sources that don't fall within the
20 prior section, a major source baseline
21 provision. So for example, under
22 52.21(b)(13)(2)(b), in that section, increases

28 (Pages 106 to 109)

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1 is discussed specifically. I don't know from
2 the NSR Manual if that was what was intended to
3 be referenced or not. I do know that the plain
4 language of the regulation makes the distinction
5 between major sources -- commence construction
6 after major source baseline data, where the
7 actual emissions consuming increment, and after
8 the minor source baseline date increases and
9 decreases effectively.
10   Regarding lower sulfur coal, simple
11 questions of whether coal at the lower sulfur
12 content,.45 and other coals, were available
13 as referenced in part of the review documents
14 that DEQ did. The answer is we don't know.
15 We don't know if those are available or not
16 available, because DEQ did not identify that
17 in step 1 and deal with it in a top-down BACT
18 analysis.
19   There are a number of potential
20 sources for other cleaner coals in the Upper
21 Peninsula. But instead of identifying them
22 and discussing whether or not those could be

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1 used at Northern Michigan, DEQ just ignored
2 that and just assumed that one of two coals
3 was going to be burned.
4   JUDGE SHEEHAN: Did you point to any
5 of those other sources in your comments?
6   MR. BENDER: We didn't because we
7 don't have the information the DEQ has. It's
8 under the New Source review manual, it's DEQ --
9 it's actually the permit applicant's obligation
10 first, and then DEQ's obligation to do an
11 exhaustive search of potentially applicable
12 pollution-control options, which includes
13 cleaner fuel. That was not done.
14   JUDGE SHEEHAN: But I thought I heard
15 you to say you knew of other sources than the
16 two selected by NMU.
17   MR. BENDER: We know that there are
18 coal-burning facilities generally in Northern
19 Wisconsin, and we know that there are coal
20 terminals where, of course, taken off barges and
21 stockpiles. We don't know what the coal sulfur
22 content is or is not at any of those. And the

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1 point is that it's the permit applicant and then
2 the permit authority's job to identify those.
3   I think DEQ has conceded here today
4 that it didn't do that. It just assumed. It
5 just assumed that coal for one of these two
6 power plants would be burned. And it assumed
7 that the coal would have the highest sulfur
8 content that either or those two plants is
9 authorized to burn.
10   There's also discussion on why
11 snowfall in Northern Michigan makes it
12 difficult to deliver wood, biomass fuel, but
13 it does not make it difficult or impossible
14 to deliver coal fuel. The record doesn't
15 indicate it. And in response to comments,
16 there was no indication -- in response to
17 comments was when DEQ identified the snowfall
18 as the problem, and actually identified
19 snowfall at two different months: April of
20 '07, April of '08 as months with a lot of
21 snowfall.
22   It did not identify where they were

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1 getting biomass fuel from. They didn't
2 identify how far away it was, and it didn't
3 identify other storage possibilities in town,
4 parking lot, vacant lot, another industrial
5 facility that could handle or store that
6 biomass material. Again, it's something
7 that's not in the record. So step 1 top-down
8 BACT analysis was not completed as intended
9 in the NSR Manual.
10   There's also a discussion from DEQ
11 on how it is assured -- DEQ is assured that
12 SO2 control will be achieved at a constant
13 rate of emission, assuming 92 percent control
14 of SO2. This is the first time Sierra Club
15 had heard that it was assured because of the
16 NSPS standard. As I sit here today, that
17 doesn't sound like a correct interpretation
18 of NSPS for the permit to meet, but I don't
19 have that NSPS section memorized. So if the
20 Board decides to consider that argument,
21 Sierra Club respectfully requests to be able
22 to brief that small issue.

1   There's also -- DEQ made I think
2 the concerning remark that if it was asked
3 to, or a remand occurred to justify the
4 pre-construction monitoring that was done,
5 that DEQ would just write a letter to the
6 applicant saying the monitoring is fine. It
7 meets their criteria.
8   You know, from the distance of the
9 monitors compared to the PSD monitoring
10 guidelines that it can't meet the criteria.
11 The guidelines are clear on what's -- what
12 meets the location criteria to take the first
13 criteria. For example, we know, as we
14 discussed earlier today, as we addressed in
15 our brief, 10 kilometers giving DEQ and NMU
16 the benefit of the doubt and all the
17 assumptions in that, in the three
18 possibilities in the PSD monitoring -- giving
19 them the benefit of the doubt, 10 kilometers
20 is the distance.
21   There's no argument. There's no
22 justification made that the monitors can meet

1 that criteria.
2   And there was also a discussion on
3 how DEQ just knows -- knows what air quality
4 is like and knows that the monitors are
5 representative. There's no information to
6 support that. There's no monitoring data
7 that we could find for Marquette County,
8 Michigan at all.
9   There are other regional monitors
10 in Michigan which were not used. We don't
11 think those would meet the location criteria
12 either. But we don't know why monitors that
13 were used were used, and why the monitors
14 that were not used were not used. And so
15 even if the 10 kilometer did not apply, we
16 still don't know -- the public is left in the
17 dark as to why the monitoring data that was
18 used is representative of monitoring the
19 ambient air quality in the area that'll be
20 affected by the source.
21   And just in conclusion, there are a
22 number of procedural problems with this

1 permit. There are also some significant
2 issues, especially about clean fuel, that if
3 the applicant and DEQ's interpretations are
4 taken and accepted -- have significant
5 implications nationally for other permitting
6 agencies considering clean fuels. Thank you.
7   JUDGE REICH: I have one question. If
8 I understood Mr. Gordon correctly, he indicated
9 that the question of whether MDEQ should have at
10 least considered establishing different limits
11 for the parts of the year where there was no
12 issue about availability of wood due to snows,
13 that issue was not one raised in comments on the
14 draft permit. Is that correct?
15   MR. BENDER: I don't --
16   JUDGE REICH: Or let me ask more
17 specifically. Did Sierra Club raise that issue?
18   MR. BENDER: Sierra Club raised the
19 issue of using clean fuels and maximizing clean
20 fuels in establishing the BACT limit. DEQ's
21 response was -- in April of '07 and April of
22 '08, there were heavy snowfalls which may

1 prevent wood from being delivered. And it's our
2 position that that analysis wasn't done
3 according to a top-down process and shouldn't be
4 given any credence. But for argument's sake,
5 even if there are periods of the year where
6 snowfall prevents wood trucks but not coal
7 trucks from reaching the plant, that the proper
8 way to deal with it is similar to how start-ups
9 and shut-downs are dealt with. If emission
10 rates, BACT limits can't be met during those
11 times, there's a special carve-out for them with
12 boundaries places around them.
13   JUDGE REICH: But are you saying, and
14 maybe Mr. Gordon can react to this as well, that
15 in terms of the draft permit, there was no
16 articulation of this problem of getting wood in
17 the winter that was used to explain why the
18 permit limits were proposed as they were.
19   MR. BENDER: Not very clearly. And
20 there may be some -- I don't recall everything
21 in the application or record. But not very
22 clearly, and frankly, the response to comments

1 isn't very clear either for how this weather
2 emergency really happens, how often it actually
3 happens. And in fact, DEQ had to point to
4 weather data on the Internet outside the record
5 in its response in support of this position.
6 And so there's -- if there's anything, it wasn't
7 much, and even with this response to comments,
8 it's not much. Thank you.
9 MR. GORDON: Very briefly, just to
10 really address that last question. The draft
11 permit and the fact sheet that went out with the
12 draft permit at the beginning of the public
13 comment period identified the number of days
14 that the boiler would burn wood, the number of
15 days that the boiler would burn coal. And look
16 at the Petitioners' comments; they didn't
17 address that point at all.
18 They addressed the point that we
19 shouldn't require a particular -- this
20 1.5 percent sulfur content is something that
21 was not correct, and that we should require
22 the -- DEQ should be requiring all wood and

1 no coal, but this particular mix of wood and
2 coal and that it should be in the summer
3 months, it should be more -- it should be all
4 wood because the fuel delivery disruptions is
5 not at issue in the summer months. That
6 point was not raised at all.
7 And the issue was teed up prior to
8 the start of the public comment period. It's
9 our position that the issue was not preserved
10 for appeal.
11 JUDGE REICH: In a sense, it was clear
12 that the way you were proceeding was driven in
13 part by unavailability of wood in winter months.
14 MR. GORDON: Correct. And
15 specifically, the 8 days of wood and 22 days of
16 coal has actually been the fact sheet itself.
17 That breakdown of how much wood and how much
18 coal.
19 JUDGE REICH: Right, but also the
20 rationale for it.
21 MR. GORDON: Yes. I believe, yes, it
22 is. It's my recollection that it is, yes. And

1 then, again -- you know, as to this issue as to
2 whether actual emissions should be -- from the
3 entire plant should be excluded from the
4 analysis of whether -- that all actual emissions
5 from the facility are increment-consuming if the
6 facility makes a modification after the major
7 source baseline date. Again, I think the
8 Petitioner's argument is reading out of the
9 definition of actual emissions that portion that
10 talks about -- mentions that -- or associated
11 with construction that occurred after the major
12 source baseline date. I don't think there's any
13 basis for that argument. It requires ignoring
14 the particular provision on which they're
15 relying.
16 Unless there are other questions, I
17 don't have any other points to raise. I
18 think I addressed all their points that they
19 raised in rebuttal, frankly, in the thorough
20 discussion that we had previously.
21 Thank you.
22 JUDGE REICH: Thank you. Mr. Finto?

1 MR. FINTO: I just wanted to make a
2 couple points. There were some questions about
3 the increment and some discussion about the
4 language in 52.21(b)(13)(i). The baseline does
5 include the air quality. We put the air quality
6 on the baseline date. There's been some
7 discussion about 52.21(b)(13)(i)(a) which says
8 you include the actual emissions from
9 construction after the baseline date is not
10 included.
11 And then 52.21(b)(13)(i)(b), which
12 I think is the important one here, says that
13 actual increases or decreases that occur
14 after the minor source baseline date are not
15 included in the baseline. And that's the
16 provision that allows for the expansion of
17 increment. And that is why this netting
18 process is used. And that is the basis for
19 what Michigan did. Michigan's process is
20 completely consistent with what EPA said to
21 do in the proposed clarification to the
22 increment modeling.

31 (Pages 118 to 121)

122

1   With respect to fuels, there was
2   some economic analysis done in the permit
3   application. There was also a follow-up
4   letter that showed economic analysis. So
5   consumption of coal is not purely a function
6   of the weather. It was also a function of
7   economics. And subsequent to the permit
8   application, there was an additional
9   submittal.
10   Finally, there were some questions
11   about what to do with the record. Well, the
12   question we go back to is clear error, and
13   that is the question about whether the
14   information here reflects whether there would
15   have been a different permit decision
16   reached. And as Mr. Gordon put out, it's
17   just a matter of documentation. It seems to
18   us that that's not clear error. Thank you.
19   JUDGE REICH: I just wanted to make
20   sure I heard correctly. Did you say that the
21   decision on the mix of coal versus wood was in
22   part a question of economics?

123

1   MR. FINTO: There was some economics.
2   My understanding is that the MDEQ did ask for
3   some additional information that was submitted.
4   It was alluded to in the cover letter with the
5   original permit application on February 5, 2007.
6   And if you'd like, I can make sure that I can
7   get to you subsequent to this the letter that
8   had the other information in it.
9   JUDGE SHEEHAN: Are you referring to
10   the -- I presume to the permit addendum from
11   September of '07?
12   MR. FINTO: I believe that's correct.
13   JUDGE SHEEHAN: Yes, I think it's the
14   last few paragraphs you're talking about there
15   in which you say, "Cost effectiveness
16   spreadsheet has been included, and it shows
17   numbers," I won't repeat them here, "much higher
18   than recent BACT cost effectiveness
19   determinations." And then it concludes that
20   because of cost, no change will be made.
21   It seems a rather conclusory
22   statement, but we'll look at it. We know to

124

1   what you refer.
2   JUDGE REICH: With Judge Sheehan's
3   indulgence, can I ask Mr. Gordon to answer a
4   question -- in the determination that MDEQ made
5   on this issue, were you relying on the economics
6   as well as the potential unavailability of fuel?
7   MR. GORDON: I'm not aware of DEQ
8   relying on the economic issue as its basis.
9   JUDGE REICH: Okay.
10   JUDGE SHEEHAN: This concludes our
11   argument. Thank you all very much for your
12   participation.
13   (Whereupon, at approximately
14   12:04 p.m., the ORAL ARGUMENT was
15   adjourned.)
16   * * * * *
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32 (Pages 122 to 124)

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